No. 723

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, APPELLANT

v.

MASONITE CORPORATION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 843–853) is reported in 40 F. Supp. 852.

JURISDICTION

The final judgment of the District Court was entered September 27, 1941 (R. 884–885). A petition for appeal was filed on October 2, 1941, and was allowed the same day (R. 885, 894). Jurisdiction is conferred on this Court by Section 2 of the Expediting Act of February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 1167, 15 U. S. C. § 29, and Section 238 of the Judicial Code, as

amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. § 345. Probable jurisdiction was noted on November 24, 1941.

QUESTION PRESENTED

Appellees are ten large corporations engaged in the manufacture and distribution of building materials. Appellee Masonite Corporation has executed an identical "*del credere* agency agreement" with each of the other appellees that requires it to sell hardboard at prices and on terms and conditions of sale specified by Masonite. The other appellees obtain from Masonite all of the hardboard they sell in the United States. The question presented is whether the appellees have combined to restrain trade in violation of the Sherman Act.

STATUTE INVOLVED

The relevant provisions of Section 1 and Section 2 of the Act of July 2, 1890, c. 647, 26 Stat. 209, c. 690, 50 Stat. 693, 15 U. S. C. §§ 1, 2, known as the Sherman Act, follow:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with

foreign nations, shall be deemed guilty of a misdemeanor * * *.

STATEMENT

This is a direct appeal by the United States from a final judgment of the United States District Court for the Southern District of New York, dismissing the bill of complaint. The bill, which was filed on March 11, 1940, charged that appellees had contracted, combined, and conspired to restrain and to monopolize interstate commerce in the manufacture, sale, and distribution of hardboard in violation of Sections 1 and 2 of the Sherman Act.

THE FACTS

The case was tried in part on stipulations of fact and in part on oral and documentary evidence. Most of the ultimate facts are not in dispute.

I. THE NATURE OF HARDBOARD AND DESCRIPTION OF APPELLEES' BUSINESS

A. *Description of hardboard and insulation board:* Hardboard, the principal product involved in this litigation, is a homogeneous hard, dense, grainless, synthetic board. In the manufacture of hardboard by Masonite Corporation, wood chips are subjected to high pressure and discharged from "guns" in a fibrous state. The fibre is then mixed with water, processed, and pressed under heat in hydraulic presses. The re-

sulting product has a high tensile strength, a very low water absorption and a density that ranges from 30 to 60 lbs. per cubic foot (R. 178).[1]

Hardboard is used in the building industry as a wallboard, for decorative or waterproof paneling, flooring, ceilings, and forms into which concrete is poured. Hardboard is also used in the furniture, toy, advertising, pleasure boat, automobile and motion picture industries. The use of hardboard in these industries is described in the trade as "industrial use" to distinguish it from use in the building industry (R. 517, 178–179.)[2]

Some of the evidence relates to insulation board. This is a synthetic board, produced on presses similar to those used to produce hardboard. Compared with hardboard, insulation board is softer and lighter, has a lower tensile strength, and is less resistant to water. Its density is less than 30 lbs. per cubic foot. Because of its special characteristics insulation board is used chiefly as an insulation material in the construction industry. (R. 174, 178.)

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[1] There are different varieties of Masonite's hardboard, the three most important being Presdwood, Quartrboard, and Temprtile. Within each variety the board is classified by thickness. (R. 554–559.)

[2] There are a number of other building materials that can be substituted for hardboard for some purposes. No one of these products, however, is a complete substitute for hardboard (R. 178–179).

Dealers in building materials usually order hardboard and insulation board from the same supplier. Hardboard and insulation board can be combined to constitute a carlot which can be shipped at a carlot freight rate that is lower than the less than carlot freight rate applicable to hardboard or insulation board.[3] (R. 184, 499, 594–595, 603, 610, 619, 635, 665–666, 678.)

B. *Description of appellees and their business:* The appellees are Masonite Corporation, Celotex Corporation, Certain-teed Products Corporation, Johns-Manville Sales Corporation, Insulite Company, Flintkote Company, National Gypsum Company, Wood Conversion Company, Armstrong Cork Company, and Dant & Russell, Inc.

Masonite produces more than 96 percent of all hardboard sold and distributed in the United States. The only other company now manufacturing hardboard for sale in the United States is United States Gypsum Company, which is not a party to this action.[4] (R. 193.) Two of the appellees, Insulite and Celotex, at one time manufactured

[3] Insulation board is the only building material that can be combined with hardboard for the purpose of obtaining a carlot freight rate. For example, no carlot rate is applicable to combined lots of hardboard and roofing. (R. 184.)

[4] On April 11, 1941, 12 days prior to the trial of this case, Masonite instituted a suit against United States Gypsum Company in the United States District Court for the Northern District of Illinois, charging that the United States Gypsum Company was infringing four patents owned by Masonite.

hardboard for sale in the United States in competition with Masonite, but ceased that manufacture as a result of the transactions explained later in this brief. (See pp. 10–22, *infra*.)

In 1940 the dollar value of hardboard sold by all of the appellees collectively was $7,821,795.55.[5] Masonite furnishes to the other appellees all of the hardboard that they sell in the domestic market. Masonite does not purport to sell hardboard to the other appellees, but delivers it to them under the terms of the "*del credere* agency agreements" that are described in detail later in this brief. From time to time Masonite has sold hardboard to Celotex for export and to United States Gypsum Company for resale in the domestic market.[6]

It is not disputed that the appellees, considered collectively, occupy a dominant position in the production and sale of insulation board. In the year 1940 the dollar value of the insulation board sold by all of the appellees collectively was approximately $29,000,000. In the year 1940 appellees produced approximately 900,000,000 feet

[5] This figure represents the net amount received by all appellees from the sale of hardboard "after deduction of commissions" (R. facing 420).

[6] These sales to United States Gypsum Company began in 1934 and continued until 1939. In volume they amounted to two or three percent of Masonite's total sales of hardboard during that period. (R. 193.)

of insulation board.[7] (R. 841.) The appellees include all but three of the 12 companies reporting sales between 1929 and 1939 to the Insulation Board Institute, a trade association composed of manufacturers of insulation board (R. 842).

Each of the appellees is a large corporation engaged either in manufacturing and selling building materials, or in selling building materials manufactured by others.[8] Each of the appellees maintains an independent selling organization for the purpose of distributing the products it handles, including hardboard, insulation board, and other building materials (R. 202–206, 618). The record shows that the appellees to a large extent sell in the

[7] The dollar figure represents the gross amount received by all of the appellees from the sale of insulation board. Because of differences in appellees' fiscal years, both the dollar volume figure and the footage figure doubtless require adjustment. Nevertheless, these figures accurately indicate the magnitude of appellees' sales of the insulation board. (R. 841.)

[8] The only two appellees not engaged in manufacturing building materials are Johns-Manville Sales Company and Dant & Russell. Johns-Manville Sales Company is a wholly owned subsidiary of Johns-Manville Manufacturing Company and acts as a sales outlet for the building materials manufactured by its parent. Dant & Russell is the exclusive distributor of insulation board manufactured by the Fir-Tex Company of Portland, Oregon. It also distributes other building materials. Certain-teed does not manufacture insulation board but distributes insulation board that is manufactured by Hawaiian Cane Products, Limited, and Celotex. Celotex owns 23.6 percent of the common stock of Certain-teed. (R. 175–176, 177.)

same markets and solicit the same customers (R. 501, 540, 542, 681, 537, 609).

C. *Interstate commerce in hardboard:* Masonite manufactures hardboard at its factory at Laurel, Mississippi, and ships the hardboard into other States to warehouses owned by the other appellees. Substantial amounts of the hardboard received by the other appellees at their warehouses are thereafter sold in interstate commerce. Hardboard is also sold in interstate commerce from the factory of Masonite directly to its own customers and to customers of the other appellees. (R. 177–178.)

II. THE MAKING OF THE AGREEMENTS

A. *Competition in the manufacture and sale of hardboard prior to October 10, 1933:* In 1926 Masonite began the production of hardboard which it distributed through its own selling organization. At this time Masonite had pending in the Patent Office at least four applications whose claims covered both hardboard and processes for making it. At various dates between March 30, 1926, and March 20, 1928, four patents were issued to Masonite on these applications. (R. 179.)

Some time in 1928 Celotex, a large producer of insulation board, announced that it intended to begin the manufacture of hardboard from bagasse, a waste product produced by grinding sugar cane. In 1929 Celotex purchased presses similar to those used by Masonite and began to produce

hardboard that had the same physical characteristics and the same uses and general appearance as Masonite's hardboard. On various dates in 1929 and 1930 Celotex filed patent applications with claims covering hardboard and processes for its production. Thereafter, six patents were issued to Celotex on these applications. (R. 180–181, 643, 615, 724, Exhibit 26 original.)

On October 28, 1928, Masonite notified Celotex that its hardboard infringed Masonite's patents. Subsequently, representatives of the two companies met in New York to discuss a proposal, first made by Celotex, that the two companies enter into a cross-licensing arrangement. No agreement was reached. Celotex continued to manufacture and to sell hardboard. Its product was generally accepted and used extensively in the building and motion picture industries. The volume of the hardboard produced and sold by Celotex increased from approximately 800,000 square feet in 1929 to 12,000,000 square feet in 1933. Celotex sold its hardboard at prices below those charged by Masonite. (R. 180, 181, Exhibit 20, R. 811.)

In 1930 Insulite, a manufacturer of insulation board, began producing a hardboard having uses and physical properties similar to Masonite's hardboard. By 1932 Insulite had developed a satisfactory process and was producing hardboard in large quantities. In that year Insulite produced about 4,500,000 square feet of hardboard. Its production rose to approximately 9,000,000 square feet in 1933,

and amounted to slightly more than 7,000,000 square feet annually in 1934 and 1935. Insulite's hardboard was sold in the same market as Masonite's at prices lower than those of Masonite. (R. 185, 514, Exhibit S–57, R. 421.)

B. *The elimination of the competition of Celotex:* The negotiations with Celotex having failed to produce an agreement, Masonite, on April 2, 1931 instituted a suit against Celotex in the United States District Court for the District of Delaware charging infringement of Masonite's patent No. 1,663,505 (R. 181). On October 19, 1932 the District Court held the Masonite patent valid but not infringed.[9] *Masonite Corp.* v. *Celotex Co.*, 1 F. Supp. 494. Thereafter, Masonite and Celotex resumed negotiations. On October 31, 1932 Ben Alexander, president of Masonite, and James P. Gillies, its executive vice president and general manager, conferred with B. G. Dahlberg, president of Celotex. Immediately after the conference Gillies wrote a letter to Mr. W. H. Mason, vice president of Masonite, summarizing the conference (Exhibit 1 for identification, R. 791–793). The letter read in part as follows[10] (R. 479, 480, 792, 793):

[9] The district court held that the claims of the patent were limited to a product manufactured from natural wood fibres and, accordingly, that the manufacture of hardboard from bagasse did not infringe the patent.

[10] Gillies testified that he wrote the letter and that the two statements quoted in the text were accurate reports of what was said at the conference (R. 478, 479–481). The letter as

> We told Dahlberg that as we could see it, Judge Nields' decision hadn't left anybody with anything. Certainly under his decision there was no way in which we could license anybody and give them the necessary price protection as well as secure it for ourselves. Dahlberg's thought was by a pooling of the patents that it might be possible to set up some kind of a price control.
>
> * * * * *
>
> Dahlberg's whole attitude seemed to be that he was perfectly willing to do anything which was constructive in setting up some kind of an establishment which could license and control the price situation.

Celotex and Masonite were unable to agree and Masonite appealed to the Circuit Court of Appeals for the Third Circuit. On July 6, 1933 a majority of the Circuit Court of Appeals held that the Masonite patent was valid and infringed. *Masonite Corporation* v. *Celotex Co.*, 66 F. (2d) 451.[11]

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a whole was offered in evidence but was excluded by the trial court. The witness testified that except for the letter he had no present recollection as to what took place at the conference. The letter was admissible as a record of a past recollection. *Insurance Companies* v. *Weides*, 14 Wall. 375, 380; 3 Wigmore, *Evidence* (3d ed. 1940) §§ 734, 738–739, 744–747. Its exclusion has been assigned as error (R. 892).

[11] The majority of the court, consisting of Judges Davis and Woolley, held that the claims of the patent covered any wood or woody material that "yields wood fibre in kind and quantity that will produce an article with the

After denial of a motion for rehearing Celotex filed a petition for a writ of certiorari in this Court. While the petition was pending Masonite reopened negotiations with Celotex with a view to settlement of the litigation (R. 484). The evidence supports the following conclusions as to its motives in so doing:

Masonite believed that its own distribution system, which at that time included about three thousand dealers, was not large enough to provide distribution on the scale desired. Celotex and certain other appellees had built up large selling organizations, and Masonite wished to use these selling organizations to distribute hardboard. (R. 512–513.)

At the same time Masonite was aware that there were reasons for avoiding an ultimate test of the validity and scope of its patents. The government offered to prove that after the decision of the Circuit Court of Appeals Masonite's patent counsel advised it by letter that if the writ of certiorari were granted "the chances are that the Supreme Court will knock the patent out";

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characteristics disclosed by the patent when made in the way the patent teaches." It concluded that bagasse was such a woody material. 66 F. (2d) 451, 455. In both the District Court and in the Circuit Court of Appeals, Masonite's counsel contended that the claims of the patent covered substantially all of the vegetable kingdom. (1 F. Supp. 494, 498; Brief for Appellant, *Masonite Corp.* v. *Celotex Co.*, No. 5069, C. C. A. 3, decided July 6, 1933, pp. 85, 86.)

that Masonite "should get ahead with Dahlberg as fast as possible" (Exhibit 3 for identification, R. 796); and that the company had "little to lose by getting together with Dahlberg at this time and you might have a whole lot to gain" [12] (Exhibit 4 for identification, R. 797). Furthermore, Masonite was informed that Celotex was confident of the soundness of its attack on the validity and scope of Masonite's patents and was prepared to carry the

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[12] These statements were contained in two letters written by H. H. Dyke, counsel for Masonite, to Mr. James P. Gillies, executive vice president and general manager of Masonite, one dated August 23, 1933, and the other August 24, 1933. In the letter dated August 23, 1933, Dyke also said (R. 796):

> The facts that Huxley [counsel for Celotex] can tell the Supreme Court that this is a case where the Judges have divided equally, two on a side, and that it is a matter of great public interest, raises something more than a marginal possibility that the Supreme Court may call it up there by a writ of certiorari.

The trial court rejected this documentary evidence, although it permitted the officers of Masonite to testify at length as to their motives in making the contract with Celotex (R. 491, 508–509, 512, 515, 675–679).

The authenticity of the letters was not disputed, nor was it controverted that Dyke was then acting as counsel for Masonite (R. 487). The letters were admissible and their exclusion has been assigned as error (R. 892). *Loewe* v. *Lawlor*, 235 U. S. 532, 536; *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 978 (S. D. N. Y.); *Buchanan* v. *United States*, 233 Fed. 257, 259 (C. C. A. 8); *Queensboro Nat. Bank of City of New York* v. *Kelly*, 48 F. (2d) 574, 577 (C. C. A. 2). In *United States* v. *Corn Products Refining Co.*, *supra*, an antitrust case, Judge Learned Hand referred to documents of the same general character as having "the highest validity as evidence of intention."

attack to the Supreme Court unless the controversy could be settled."[13]

The evidence also shows that Masonite was determined to avoid price competition in the marketing of hardboard and for this reason chose to use the "agency" arrangement that it subsequently made with the other appellees. (See pp. 27–47, *infra*.) Gillies testified (R. 515):

> Under a valid patent setup, we felt that we had a perfect right to control the price on our own patented products, and under those conditions we use the agency agreement in order to maintain our rights.

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[13] Dahlberg testified that he told Gillies "We don't think we are licked by an awful jugful." He also testified that he "tried to impress Gillies with the idea that it was a thousand to one chance that he might win in the Supreme Court." (R. 573.) Dahlberg also made this significant statement in his testimony as to his attitude toward the patent litigation (R. 573):

> There was no idea of our losing at all, because in my opinion—and I pointed that out to Gillies—the opinion of the Circuit Court was so conflicting that until you got to the last two lines you would think they were going to decide in favor of Celotex. But in the last two lines they say, "Nevertheless", or something to that effect, "we hold it valid."

Dahlberg also testified that Young, one of the receivers of Celotex, thought the chances that the Supreme Court would issue a writ of certiorari were "pretty slim". There is no evidence, however, that Young ever expressed this view to any representative of Masonite or that Young had any doubts as to the soundness of Celotex's position on the patents. (R. 573.)

Q. By your "rights", you mean the maintenance of the price?—

A. The maintenance of the price as long as it was our own material.

Gillies' testimony on this point was confirmed by Alexander, president of Masonite.[14] He explained that Masonite decided in favor of an "agency" form of agreement because that arrangement (1) gave Masonite the "right" to fix the price for hardboard, (2) gave Masonite the "right" to fix terms and conditions of sale, (3) enabled Masonite to keep the industrial market to itself, (4) required the "agent" to acknowledge the validity of Masonite patents, and thus gave Masonite "a temporary surcease from constant infringements suits", and (5) assured both Masonite, and the "agent", of "continuity" of supply (R. 677–678). Alexander admitted that Masonite selected an "agency" agreement because Masonite "wanted to keep the control and the direction and voice in the distribution of our products in our own hands" (R. 695). Alexander also testified that the desire to secure wide distribution was not the reason for selecting an "agency" rather than a sales arrangement. Alex-

[14] See also Gillies' letter to Darrell Boyd, dated October 16, 1933. He said, speaking of the agreement made with Celotex (Exhibit 15, R. 805):

> In this agreement we retain title to the goods until sold to the dealer in order to exercise price control under a sales arrangement.

ander said: "I never thought of volume in connection with that decision" (R. 695). The desire to control the price was the reason Masonite refused to sell hardboard to Celotex for resale.[15]

So far as concerns Celotex the evidence indicates that its representatives felt that for commercial reasons it was desirable for the company to be in a position to distribute hardboard. Furthermore, the company was in receivership and the expense of the patent litigation was becoming burdensome.[16] The evidence indicates that Celotex did not suggest the "agency" arrangement but would have preferred either a license to manufacture under the Masonite patents or an arrangement by which Masonite sold hardboard to Celotex.[17] On the other hand, there is no doubt that in the negotiations Celotex was interested in the price question. This is indicated by the letter of Gillies dated October 31, 1932 (p. 11, *supra*), written after the decision of the district court in which Gillies stated that Dahlberg was willing to "do anything which was constructive in setting up some kind of an establishment which could license and control the price situation" (R. 480, Exhibit 1 for

[15] Gillies said (R. 516): "If we had made the sale, we would not have owned the material, we would have lost title to it."

[16] See note 19, page 17, *infra*.

[17] Dahlberg testified that he was "not personally in favor of this cussed del credere business" and that he did not wish to "become simply a peddler of other people's goods" (R. 589).

identification, R. 793). Moreover, Dahlberg testified that in all of the negotiations with Masonite he insisted upon the adoption of a "formula" that would require Masonite to adhere to the same prices for hardboard that were charged by Celotex[18] (R. 575–576, 583, 684–685).

As a result of the negotiations Masonite and Celotex concluded an agreement on October 10, 1933 that was embodied in two documents: (1) a so-called "agency agreement and license option" and (2) a supplemental agreement[19] (R. 216–234). These agreements, whose terms and conditions will be discussed in detail later (see pp. 27–47, *infra*), provided among other things: (1) that Celotex should dismiss its petition for a writ of certiorari and acknowledge the validity of Masonite's patents; (2) that in the sale of hardboard

[18] See Dahlberg's letter to Gilles dated September 20, 1933 (Exhibit 23, R. 812).

[19] On June 16, 1932, the United States District Court for the District of Delaware appointed receivers to conduct the business of Celotex. Hobart P. Young, who previously had been counsel for Celotex, and Colin C. Bell, were appointed receivers. (R. 570, 182.) Subsequently, on June 17, 1932, Hobart P. Young was appointed ancillary receiver by the United States District Court for the Northern District of Illinois. (R. 182.) On October 10, 1933 that Court entered an order authorizing Young to execute the agreement with Masonite. The order referred to the contract as a "certain sales agreement". (R. 210.) The Order of the District Court of the Northern District of Illinois was ratified by the District Court of Delaware on October 12, 1933, two days after the contract was actually executed between Masonite and Celotex (R. 211).

Celotex should adhere to the prices fixed by Masonite and that Masonite itself should adhere to the same prices; and (3) that the sale of hardboard for industrial purposes should be the exclusive province of Masonite.

C. *The Elimination of Competition of Insulite.* It has been pointed out that by 1932 Insulite was producing and selling a substantial quantity of hardboard at prices lower than those of Masonite. (See pp. 9–10, *supra*.) As early as October 1932 the production of hardboard by Insulite had been discussed at a conference between Masonite and Celotex (Exhibit 1 for identification, R. 792). In 1933 Gillies called at the Insulite plant to discuss the possibilities of an agreement between Masonite and Insulite (R. 500, 624). In September 1933 Masonite sent a copy of the proposed "agency" agreement to Insulite [20] (R. 624). The extent to which Masonite was concerned with the competition of Insulite is indicated clearly in a letter written by James P. Gillies to Harold C. Harvey, president of Agasote, dated December 6, 1933. The letter read in part as follows (Exhibit 2, R. 794):

> The only commercial hardboard offered through the lumber dealers is being offered

[20] At the same time Masonite sent copies of the proposed agreement to a number of the other appellees. (See p. 22, *infra*.)

> by Insulite and Wood Conversion and is of Insulite manufacture. We wanted some means of making the proposition to them as attractive as to any other Agent in the hope of getting everybody in the same bed and under the same blanket. I think you will agree with me that such a move would be as advantageous to the rest of our Agents as it would be to Masonite itself, especially when Masonite is paying the costs.

Despite Masonite's overtures in 1933 Insulite did not accept an "agency" agreement (R. 625). Throughout 1933 and 1934 it continued to manufacture and to sell its own hardboard. (See pp. 9–10, *supra*.)

On March 3, 1934 Masonite filed a suit in the United States District Court for the District of Pennsylvania against Faxon Lumber Company, a dealer that handled Insulite's hardboard, charging infringement of Patent No. 1,663,505. Because of Insulite's direct interest in the issues it undertook to defend the infringement action. Before issue had been joined negotiations between Insulite and Masonite led to the execution on February 2, 1935 of an "agency agreement and license option" identical in all important respects with the agreements that Masonite had previously executed with Celotex and with certain other appellees. (R. 897, 185–186.) When Insulite signed the "agency" agreement it knew that Ma-

sonite had previously executed these other agreements (R. 627–876).[21]

The contractual arrangements between Masonite and Insulite were embodied in three sets of documents: (1) "an agency agreement and license option", (2) two "supplemental" agreements, and (3) an export agreement and a supplemental export agreement. (Exhibit S–30, R. 235–251, 897, Exhibits S–41, S–42, S–43, R. 259–267.)

As a part of the arrangement Masonite agreed to the dismissal of the patent suit without prejudice to the patent claims of either party. Insulite agreed to produce hardboard for sale in the export market only and to secure hardboard for domestic sale from Masonite.[22] Insulite agreed to sell to Masonite the press that it had been using to produce hardboard. (Exhibit S–41, R. 259–262.) One of the supplemental agreements also provided that the acknowledgement in the "agency" agreement of the validity of Masonite's patents should operate only

[21] Prior to the execution of the agreement with Insulite, Masonite had made similar agreements with Celotex, National Gypsum, Johns-Manville Sales Corporation, Armstrong Newport Company, Hawaiian Cane Products, Ltd. and Wood Conversion Company. (See p. 23, *infra*.)

[22] At the time Insulite entered into the Agreement with Masonite, its parent corporation, Ontario Paper Company, was in the hands of equity receivers appointed by the United States District Court for the District of Minnesota. The receivership court entered an order authorizing Insulite to defend the infringement suit, and to compromise the litigation by executing the agreements with Masonite (Exhibits S–28, original, S–29, R. 235).

during the time that the "agency agreement" was in force [23] (Exhibit S–41, R. 262).

The export agreement permitted Insulite to continue production of hardboard for sale in the export market, but specifically limited Insulite's production to the "type" of hardboard that it had previously produced (R. 264). Under the export agreement Masonite could terminate Insulite's right to manufacture for export by offering to sell Insulite hardboard for that purpose. By its terms the export agreement could be canceled thirty days after the termination of the agency agreement. (Exhibit S–43, R. 265, 266.)

In 1937 Insulite and Masonite both had applications for patents relating to hardboard pending in the Patent Office and certain claims of these applications were involved in interference proceedings. By a contract dated February 1, 1938 the interference proceedings were compromised by Masonite's conceding priority to certain patent claims of Insulite. By this contract Insulite gave Masonite an exclusive royalty-free license under all of Insulite's patents and patent applications relating to hardboard.[24] The license expressly ex-

[23] This supplemental agreement also provided that Masonite should have the right to secure a license under certain of Insulite's patents and patent applications without the payment of royalty. (R. 262.)

[24] By the same agreement Masonite assigned to Insulite, or gave it a license under, certain foreign patents owned by Masonite.

cluded Insulite from using these patents.[25] (R. 188–189, Exhibit S–48, R. 384–394.) This license agreement is still in effect. (See pp. 46–47, *infra.*)

D. *The agreements with the other appellees:* On August 29, 1933, shortly after the decision of the Circuit Court of Appeals in the patent litigation between Celotex and Masonite, but before the execution of the agreement by the two companies, Masonite sent a copy of a proposed "agency" agreement to Johns-Manville Sales Corporation (R. 495, 602). The covering letter stated that Masonite was contemplating entering into similar agreements with other companies (R. 602). About the same time the same proposed agency agreement was sent to National Gypsum Company, Armstrong Newport (the predecessor of Armstrong-Cork Co.), Hawaiian Cane Products, Limited, and Insulite (R. 495, 624, 632).

All of these companies executed identical agreements with Masonite on various dates between Oc-

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[25] There were fourteen of these patents and patent applications. The license agreement provided that it could be cancelled on thirty days' notice after the termination of the "agency" agreement (R. 386).

Paragraph 8 of the license agreement gave Masonite the right to sue under the Insulite patents, and Paragraph 10 gave Masonite an option to purchase the Insulite patents (R. 390, 392). The agreement also provided that the parties would cooperate to settle any future interference proceedings in the Patent Office, "to secure the issue of such claims and of claims for all other additional patentable subject matter common thereto in a valid patent or patents issued in the name of the original and first inventor or inventors thereof * * *" (R. 391.)

tober 31, 1933 and June 25, 1934 [26] (R. 186). The terms of these agreements are described in detail below, *infra* pp. 27–47.

Prior to the time National Gypsum, Johns-Manville Sales Corporation, Armstrong Newport Company and Hawaiian Cane Products, Ltd. signed the agreements with Masonite, each knew of the existence of the substantially identical contracts that Masonite had previously made with other concerns (R. 876). As each contract was

[26] The following table shows the date of each agreement:

Title of Agreements	Company	Date
Agency Agreement and License Option.....	National Gypsum	October 31, 1933
Agency Agreement and License Option, Supplemental Agreement.	Johns-Manville Sales.	November 30, 1933
Agency Agreement and License Option, Supplemental Agreement.	Armstrong	December 1, 1933
Agency Agreement and License Option.....	Hawaiian Cane Products, Ltd.	December 4, 1933
Agency Agreement and License Option, Supplemental Agreement.	Wood Conversion.	June 25, 1934

The agreements between Masonite and the appellees listed above were embodied in two documents: (1) a so-called "agency agreement and license option" and (2) "supplemental" agreements. The so-called "agency agreements" were identical in all respects; deviations from the norm of the arrangement were embodied in the "supplemental" agreements. (R. 897, Exhibits S–32, S–34, S–39, R. 252–259.)

Masonite, on January 4 1934 signed an "agency agreement and license option" with Agasote Millboard Company. This agreement was canceled by Masonite on November 10, 1938. (R. 186, 187.)

On January 30 1937 Hawaiian Cane assigned its rights under the agreement with Masonite to Certain-teed Products (R. 188).

executed, Masonite sent copies to the companies that had previously executed similar contracts (R. 621).

E. *The modification of the agreements in 1936:* Disputes arose between Masonite and its "agents" concerning the operation and construction of the "agency" contracts. Many of these disputes related to competitive practices in the sale of hardboard. For example, disputes occurred as to the persons who were entitled to receive wholesale discounts. (R. 580–581, 686.) A more serious difficulty arose over sales of hardboard made on the basis of "combined bids". A "combined bid" was a lump sum price quoted by the seller on a lot that included both hardboard and insulation board or some other building material. In making these combined bids, some of the "agents" reduced the price of insulation board or other building material and thus secured a competitive advantage in the sale of both hardboard and the product with which it was combined (R. 582, 683, 524–525).

Disputes also arose over the handling of pool cars, *i. e.*, cars ordered by a single person acting for a group of buyers who had pooled their orders. Under Masonite's price schedule a carlot ordered by a single buyer carried a lower price than one ordered by a group of buyers. Some of the "agents" billed pool cars as if the order were, in

fact, for a single buyer. Masonite regarded this as a violation of the contract (R. 579–580, 521).

Masonite and the other appellees felt that the contracts were not sufficiently precise as to the disputed points and, accordingly, in 1936 a new form of agreement was executed (R. 684). As in the case of the earlier agreements the new arrangement was embodied in two sets of documents, (1) a "*del credere* factor's agreement" and (2) "supplemental agreements". (Exhibits S-44, S-45, R. 268–350.) All of the "*del credere* factor's agreements" were absolutely identical, except for the name of the parties (R. 187–188, 898). The deviations from the norm of the arrangement were embodied in supplemental agreements and in no case touched the substance of the relationship between the parties.

As each agreement was executed it was placed in escrow so that all of the agreements could become effective on the same date. The escrow agreement signed by each "agent" expressly provided that the new contract with Masonite should become effective only when all of the other "agents" had agreed to it. The escrow agreement named each of the other "agents" so it is certain that each of the appellees was aware that the other "agents" were simultaneously executing identical agreements with Masonite and that each agreement was to became effective only when the

others did. (Exhibit 30, R. 821–823, 616.) The new contracts became effective on October 29, 1936 [27] (R. 187–188).

F. *The agreements made in 1937 with Flintkote and Dant & Russell:* On March 16, 1937, The Flintkote Company entered into an "agency" agreement with Masonite. Although the agreement was not identical with the 1936 agreements made with the other appellees it was substantially similar in all important respects.[28] (R. 188, Exhibit S–46, R. 351–384). On June 19, 1937 Dant & Russell, Inc. entered into an agreement with Masonite identical with the agreement between Masonite and Flintkote (R. 188, 898). Both Flintkote and Dant & Russell knew when they executed the agreement that similar "agency" agreements ex-

[27] Although at the time of the execution of the 1936 agreement Insulite's parent company, Minnesota and Ontario Paper Company, was still in the hands of receivers, no court order was entered approving the new contract (R. 788).

[28] The Flintkote and the Dant & Russell agreements differed in form from the other contracts in one important respect: Each provided that Masonite should have the absolute right to terminate the agreement at any time in the event that the "agent" should engage in the business of selling or distributing anywhere in the continental United States any other product, whether of its own manufacture or manufactured by others, which by reason of its physical characteristics and selling price constituted a commercially competing product with, or substitute for, the Masonite's hardboard products. The right to determine whether the product came within the foregoing inhibition was vested solely in Masonite, but it was not to exercise the right arbitrarily. (Exhibit S–46, Sec. 16, R. 371.)

isted between Masonite and the other appellees (R. 635, 717).

G. *Modification of the agreements in March 1941:* The parties continued to operate under the 1936–1937 agreements until three weeks before the trial of this case. Early in 1941 a committee of the appellees was designated to draft a new agreement. After at least two meetings attended by representatives of all of the appellees the committee drafted the agreement under which the parties are presently operating. (R. 465–466, 522, 584, 600–601, 633, 636, 700–701.) This agreement, which differs in a number of important respects from the earlier agreements, was dated March 20, 1941, but the parties did not begin operating under it until April 1, 1941 (R. 522). Alexander, the president of Masonite, testified that this litigation was the only reason for the execution of the new contracts (R. 700).

III. THE NATURE OF THE AGREEMENTS

A. *The agreements in effect between 1933 and 1941:* The contracts made by Masonite with the other appellees between 1933 and 1935 differed in some details from those executed in 1936 and 1937, but both sets of agreements are similar in their essentials and may be discussed together.[29]

[29] Unless the text indicates otherwise, statements in this section of the brief may be taken as referring to the provisions of both sets of agreements; unless the text indicates

1. *Provisions as to prices and terms and conditions of sale:* Each of the contracts purported to establish the general nature of the relationship between Masonite and the other party thereto by the following language (Exhibit S–44, R. 269–270):

> The Manufacturer hereby appoints
>
> [The Celotex Corporation]
>
> as a del credere factor and licenses it, subject and pursuant to the terms and conditions of this Agreement, to sell, throughout the continental United States and the Hawaiian Islands, such of the Manufacturer's hardboard products, as herein defined, as shall be sold or offered for sale from time to time by the Manufacturer to the classes of trade to which the Factor is permitted to sell by the terms of this Agreement. * * *

The agreement provided that Masonite should designate minimum selling prices and maximum terms and conditions of sale. Masonite was also entitled to classify customers as wholesalers or

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otherwise, quoted provisions are taken from the 1936 agreement. (Exhibit S–44, R. 268–317.)

There are certain differences in terminology between the two sets of agreements. Each of the contracts executed between 1933 and 1935 was entitled "Agency Agreement and License Option" and the parties thereto were termed "Manufacturer" and "Agent". (Exhibit S–23, S–30, R. 216, 235–236.) The agreements made in 1936 and 1937 were entitled "Del Credere Factor's Agreement" and the parties were referred to as "Manufacturer" and "Factor". (Exhibits S–44, R. 268–269, Exhibit S–46, R. 351.)

dealers and the "agents" were bound to follow this classification. (Secs. 5, 24 (s), R. 272–273, 298–299.)

Masonite itself was bound to adhere to the prices, and terms and conditions of sale that it fixed for the "agents."[30] The existence of this obligation was conceded by counsel for Masonite at the trial and there could be no doubt as to the understanding of the parties on this point or as to the practice that they followed under the agreement. (R. 621, Sec. 5, R. 272–274.) Nevertheless, it appears that Masonite was diffident about inserting in the 1936 agreements a more explicit statement of this obligation. On October 20, 1936, counsel for Masonite wrote to the appellee Wood Conversion Company and discussed the suggestion that the contract should be more precise on this point. (Exhibit 25, R. 818–821.) The letter read in part as follows[31] (R. 819–820):

> I believe this covers all points referred to in our St. Paul conference except the one point expressed by Mr. Davis that he could

[30] Masonite also was bound to adhere to the same classification of customers as wholesalers or dealers that it prescribed for its "agents." (Exhibit S–44, Sec. 5, 24 (s), R. 272–273, 298–299, Exhibit S–45, Sec. 1, R. 333–334, Sec. 3, R. 340, Sec. 1, R. 347.)

[31] This letter was written following a meeting held in St. Paul in October 1936 between representatives of Masonite and Wood Conversion Company at which the terms and conditions of the new "*del credere* agency" contract were discussed (R. 818–819, 612–613).

> not find anywhere in the del credere agreement an express covenant by Masonite to maintain its own prices, terms and conditions of sale and brackets. I pointed out to Mr. Davis certain language in the agreement which I thought should satisfy him on this point. * * * As a legal matter it would seem highly unwise to insert an expressly spelled out provision to maintain prices, etc., which might be construed as an agreement by both companies in direct violation of the Anti-Trust Laws. I think it is much safer to limit this strictly to an agency contract rather than insist on an express covenant which might be construed as getting outside the field of agency and illegal. We, therefore, are asking Mr. Davis to waive that point and accept our agreement that as a principal we will respect our own prices, terms, conditions, etc., as a matter of protection to our agents.

This understanding was implemented by the provisions of the contract that prevented Masonite from changing its own prices without giving the "agents" notice in advance.[32]

2. *Masonite's reservation of the industrial field:* The contracts permitted the agents to sell hardboard only to the construction industry; the in-

[32] The contracts required ten days' notice of a price rise and two days' notice of a price decrease. (Sec. 5, R. 273-274.)

dustrial market was reserved for Masonite.[33] (Sec. 9, R. 283, Sec. 21, R. 292–293, 509, 679.) Sales for industrial purposes have been growing in importance throughout the life of the agreements. In 1933, the net dollar value of the hardboard sold by Masonite for industrial uses was $295,049.18. In 1940, it had risen to $2,551,623.84.[34]

In the court below Masonite attempted to justify its reservation of the industrial market on the ground that the industrial market consumed off-grade hardboard and that the other appellees had no hardboard of this kind for distribution (R. 446–447, 509, 537, 695). In fact, Masonite sells large quantities of first grade hardboard to industrial users. (R. 699, 544, 517.) Between 1935 and 1940 the sales of first grade board to industrial users were greater than the sales of off-grade board.[35]

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[33] This limitation was qualified to the extent of permitting the "agents" to sell certain off-size boards (known as "shorts") for industrial uses. (See pp. 39–41, *infra*.)

Masonite has apparently permitted Celotex to make some sales of hardboard to the motion picture industry (R. 581).

[34] These figures represent the net proceeds received by Masonite from the sale of hardboard after deduction of commissions. In 1933, 18 percent of the proceeds received by Masonite from the sale of hardboard represented sales for industrial uses. In 1940, this percentage had risen to 43.7 percent. These percentages are based on the net proceeds received by Masonite from the sale of hardboard after deduction of commissions. (Exhibit S–56, R. facing 420.)

[35] Taking an average figure for the years 1935–1940, approximately two-thirds of the hardboard sold for in-

It is apparent from the testimony that Celotex wished to sell in the industrial field (R. 575), and Alexander admitted that when the first agreement was made with Celotex that company had a sales organization that was operating in the industrial field (R. 696). Furthermore, Alexander in effect admitted that certain of the other appellees now have selling organizations that could sell hardboard for industrial uses (R. 699).

3. *Degree of independence enjoyed by the "agents" in sale of hardboard:* Except for the provisions as to price, terms and conditions of sale, classification of customers, and the reservation of the industrial market, the "agents" exercised virtually complete dominion over the hardboard and conducted their relations with Masonite at arm's length. Each "agent" determined independently of Masonite the quantity of hardboard that it would order and the nature of the stock that it would carry (R. 533); it had full control of the handling and storage of the hardboard (Sec. 4, R. 271–272, 528–529). It was under no obligation to carry a rounded stock or a minimum

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dustrial uses was first grade hardboard. For the purpose of this compilation it is assumed that all off-grade hardboard produced by Masonite was sold for industrial uses. It is not possible to make a computation of this kind for the years between 1931 and 1934 because for that period the available figures do not separate culls, which were incapable of use for any purpose, from off-grade board. (Exhibit SS–7, R. 837, Exhibit S–56, R. facing 420.)

supply (R. 533). Each "agent" employed its own selling staff and determined independently of any control by Masonite how much time "deemed by it to be reasonable" would be devoted to the sale of hardboard (Sec. 2, R. 270). The hardboard in the warehouses of the "agents" bore no identifying signs indicating that it was the property of Masonite or disclosing the existence of the "agency."[36] Although patent numbers were stamped on the hardboard sold by the "agents," there was no stamp or label affixed to the hardboard stating that it was Masonite's property (R. 527).

The contracts prohibited the "agents" from using Masonite's trade names or the name "Masonite" on the hardboard. All of the "agents" had distinctive trade names under which they sold hardboard; those trade names did not include the name Masonite or any reference to an agency relationship. (Sec. 11, R. 284, Exhibit S-54, R. 420, 527-528.) The "agents" did not disclose in their advertising that they were acting as Masonite's agents[37] (R. 628-629, 630, 638, 661, 670, 707, 717-718).

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[36] Certain of the appellees offered testimony that the hardboard while in their possession was physically segregated from their own property, but it appeared from the testimony that no attempt was made to identify the hardboard as the property of Masonite. (R. 628, 630, 633-634, 636, 639, 661, 670, 707, 718.)

[37] Most of the appellees offered evidence that for competitive purposes they disclosed to the trade that their hard-

Although Masonite was given the power to examine the books of the "agents" to determine whether they were deviating from the prices fixed by Masonite, this could be done only by an independent auditor. (Sec. 12, R. 284–285). After 1935 no audits were made (R. 525). Masonite has never attempted to determine by audit how the "agents" handled "consigned" stocks of hardboard on their books (R. 525, 529). The contract specifically denied Masonite the right to demand any trade information from its "agents" (Sec. 12, R. 284–285). The "agent" was under no obligation to segregate the proceeds of its sales.

4. *Burdens assumed by the agents:* Each "agent" paid the freight to its own warehouse and paid all of the expenses incident to the handling and storage of the hardboard (Sec. 4, R. 271–272).

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board was manufactured by Masonite (R. 629, 639, 661, 670, 707, 718). Several of them assert that the trade was informed that the hardboard was being distributed pursuant to an agreement with Masonite (R. 639, 661, Exhibit J. M. S. 2 original). The evidence indicates, however, that there was no general disclosure of the agency relationship. The most complete disclosure was probably made by Celotex. (R. 639, Exhibit C. E. L. II original.)

Excerpts from the "Standard Specifications for Temporary Housing" issued by the office of the Quartermaster General of the War Department are indicative of the lack of knowledge in the trade as to the nature of the relationship existing between Masonite and the other appellees. Those specifications list varieties of hardboard sold by Celotex, Insulite Company and Johns-Manville Company, and describe them as "manufactured by" those companies. (Exhibit SS–14, R. 837–838.)

The "agent" also bore the entire risk of destruction or injury to the hardboard while it was in its possession; the contract required it to report as "sold" any hardboard damaged in its possession (Sec. 10, R. 283–284). Each "agent" was required to assume the expense of insurance (Sec. 4, R. 272) and, with unimportant exceptions, none of the "agents" carried insurance policies that referred specifically to Masonite's interest in the hardboard.[38] Each "agent" paid all excises and taxes and was required to make all reports required by governmental authorities (Sec. 6, R. 274–275).

The "agent" indemnified Masonite against all damages resulting from injury to persons or property arising out of the handling by the "agent" of Masonite's hardboard together with all ex-

[38] For approximately two years Celotex carried a policy on hardboard that was payable solely to Masonite. From 1935 on, Celotex carried a blanket policy covering all goods in its possession irrespective of the ownership thereof, endorsed with a clause providing that the proceeds of the policy should be payable to Masonite "as its interest might appear" (R. 639–640). Insulite had one policy covering hardboard in transit that referred specifically to Masonite; its general insurance policies covering hardboard while in its possession did not refer specifically to Masonite (R. 629). In the case of the other appellees no special policy for the hardboard was taken out; it was simply covered under a blanket policy that covered property owned by the agent, as well as property held in trust, or consignment or on commission (R. 630, 634, 635–636, 661–662, 670, 708, 718–719).

penses which Masonite might incur by reason of any claim asserted for damages" (Sec. 4, R. 272).

At the termination of the agreement Masonite had the option to require the return of all hardboard in possession of the "agent", except certain off-size boards known as "shorts", but the "agent" had no right at any time to return to Masonite hardboard that it was unable to sell (Sec. 16, R. 289). Finally, the "agent" was required to assume the full credit risk on all sales of hardboard. (Sec. 7, R. 279.)

5. *Payment under the agreements:* The "agents" always ordered hardboard in carload lots and accounted for it to Masonite on that basis (R. 271, 698). The "agent's" compensation included (1) a current commission on each sale of hardboard made by the "agent", consisting of a percentage of Masonite's applicable current carlot list price, and (2) the difference between Masonite's carlot list price and the price at which the "agent" sold the hardboard [39] (Sec. 7, R. 275–280).

The method of compensation is significant because it shows that the "agent" was under no obligation to account to Masonite for the proceeds of its sales. For example, in the case of the type of hardboard known as Untempered Presdwood,

[39] This provision was added to the agreements in 1936.

[40] The "agent's" compensation also included a graduated additional commission based on the aggregate square feet of hardboard sold by the "agent" in each calendar year.

the "agent" was required to remit to Masonite 55 percent of Masonite's current carlot list price; the "agent" retained the remaining 45 percent as commission. The "agent" was required to sell the Untempered Presdwood at not less than Masonite's list price and that list price was higher for less than carlot sales than for carlot sales. Thus, if the "agent" sold Presdwood in less than carlots, he kept not only the 45 percent of the carlot price that he received as commission, but also the difference between the carlot price and the higher price fixed for less than carlots. The "agent" enjoyed the same advantage if for any other reason he was able to sell hardboard at a price in excess of Masonite's carlot list price. In other words, the "agent" was obligated to remit to Masonite only 55 percent of Masonite's carlot list price; he was entitled to keep for himself the difference between that amount and the amount for which he sold the hardboard.

Before 1936 the agreements required the "agent" to pay one half of the difference between the carlot list price and his "commission" within 20 days after the end of the month in which the shipment was made. Twenty days after the end of the month in which the hardboard was sold, the "agent" was obligated to pay the remaining one-half. If the shipment was made directly from Masonite's plant to a customer, the "agent" paid

the entire amount due within twenty days after the end of the month in which shipment was made. In both cases the "agent" was required to make the payment irrespective of whether he had received payment from the person to whom he had sold the hardboard. (Exhibit S–23, Sec. 8, R. 218–219; Exhibit S–30, Sec. 8, R. 238.)

Under the agreements made in 1936 and 1937, the "agent" was required to pay to Masonite the difference between the carlot list price and the "agent's" commission twenty days after the end of the month in which the hardboard was sold.[41] In the words of the contract, this payment was required irrespective of "whether or not the Factor shall have collected the selling price for the hardboard products so sold." (Sec. 7, R. 275–280). The "agent" was under no obligation to segregate the proceeds.

6. *Other limitations of Masonite's obligations:* Masonite agreeed that all hardboard supplied to the "agent" should be "good workmanlike products of a character and quality equal to that currently manufactured by it for sale to its

[41] These agreements conferred upon Masonite the option to require the "agent" to advance to the manufacturer within twenty days after the close of the month in which hardboard was shipped to the "agent", one-half of the sum due to Masonite under the contract. In the event Masonite exercised the option the remaining one-half became due within twenty days after the end of the month in which the hardboard was sold. (R. 277.) Masonite never exercised the option (R. 189).

own direct customers." Its liability on this undertaking, however, was expressly limited to replacing defective hardboard. The authority of the "agent" to warrant quality to its customers was not limited or defined in the agreements. (Sec. 13, R. 285.) Masonite was specifically relieved of all responsibility for failure to deliver hardwood because of strikes, floods, or other causes beyond its control (Sec. 3, R. 271).

7. *Provisions as to "longs" and "shorts":* The standard size board produced by Masonite was 12 feet by 4 feet. If a board was cut into two or more pieces and one piece was less than five feet long, that piece was defined as a "short".[42] A piece that was five feet long or longer was defined as a "long".[42] (Sec. 24 (g), 24 (h), R. 295–296.) Generally the building trades used "longs". "Shorts" were sold both to industrial purchasers and to the building trades (Exhibits S–55, SS–20 original).

The contract provided that if one of the "agents" placed an order for a "long" thereby necessitating the cutting of a standard size board, or if the "agent" cut a standard size board he was required to remit to Masonite on the basis of the full value of the standard size board, *i. e.*, the value of both the "long" ordered and the remaining piece, whether it was a "long" or a "short".

[42] Under the agreements, Masonite agreed to cut the hardboard at the "agent's" request, or to permit the "agent" to cut it. In each case, however, one of the resultant pieces was required to be a "long" (R. 281).

This payment was required irrespective of whether the remaining piece was sold. The agreements thus contemplated that the "agents" would have in their possession both "longs" and "shorts" for which full payment had been made, and the title of which has passed to the "agent" [43] (Sec. 8, R. 281–283).

Despite the fact that the "agents" had paid in full for these "longs" and "shorts" and clearly held title to them, Masonite, under the agreements, controlled the price at which these "longs" and "shorts" were sold. Even as to this hardboard, the agents agreed to abide by the prices and terms and conditions of sale fixed by Masonite with one exception: the "agents" were free to sell "shorts" to industrial customers (but not to the building industry) free of price control. (Sec. 9, R. 281–283.) The "agents" agreed, moreover, that they would not recut "shorts", which they owned, for the purpose of selling them for industrial uses (Sec. 9, R. 283). In a letter dated November 9, 1937, addressed to all *del credere* agents Masonite agreed to allow the "agents" to purchase

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[43] The first supplemental agreements made with Armstrong-Newport (par. 4 (c)), Wood Conversion (par. 9) and Insulite (par. 4 (c)) specifically provided (R. 254–255, 258, 260):

> whenever the agent shall sell a "long" for the Manufacturer the remaining portion of the full board shall be the Agent's property and no further report or payment shall be required of it to the Manufacturer.

"longs" cut from certain varieties of hardboard without an obligation to purchase the resulting "shorts". (Exhibit 18, R. 808–10.) On September 1, 1940, nearly four months after the joinder of issue in this case, all the provisions relating to "longs" and "shorts" were eliminated from the agreements (Exhibits S–49, S–50, R. 394–407).

8. *The license option agreement:* Each of the "agency" agreements executed by Masonite prior to 1941, (except the agreements executed with Flintkote and Dant & Russell) contained provisions giving the "agent" an option to take a license under Masonite's patents to manufacture and sell hardboard.[4] To exercise the option the "agent" was required to make a down payment that was graduated in amount, depending upon the date the license was issued. Under the agreements executed before 1936, the down payments began at $200,000 for a license issued before December 31, 1934, and decreased $25,000 each year until a minimum down payment of $50,000 was reached. (Exhibit S–23, R. 222, Exhibit S–30, R. 242.) Under the 1936 agreement, the down payment began at $150,000 for a license issued before December 31, 1936, and then decreased $25,000 each year thereafter until a minimum down payment of $50,000 was reached. (Exhibit S–44, R. 291.) Royalties were fixed at the rate of 10 percent on the manufacturer's carlot list

[4] The 1941 agreements do not contain a license option.

price for all hardboard manufactured and sold. The license required the payment of a minimum royalty of $50,000 a year. The licensee was required to observe the prices and terms and conditions of sale fixed by Masonite and was, generally speaking, subject to the same degree of control as were the "agents" under the "agency" agreements. (Exhibit S–23, R. 226–232, Exhibit S–30, R. 246–251, Exhibit S–44, R. 303–315.) The license agreement obligated Masonite to adhere to the same prices and terms and conditions of sale that it fixed for its licensee. (R. 228, 247, 304.)

None of the appellees ever exercised the option to take a license. The evidence shows that three of the appellees did not exercise the option because, in their judgment, the amount of the down payment and of the royalties made it unwise as a business matter for them to do so.[46] (R. 660–661, 666–667.)

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[46] In discussing the provisions of the agreement made in 1933 between Masonite and Celotex, Dahlberg, who was then acting for Celotex, said in a letter to Gillies, vice president of Masonite, dated September 30, 1933 (Exhibit 23, R. 816–817):

> A royalty of 10% on such material as building material seems awfully high, and in my judgment impractical, but I presume that is a matter of business judgment on which something could be said on both sides. In my opinion, however, the royalty license at $200,000.00 cash and 10% royalty would simply mean that the license would never be availed of, at least that is the way I look at it now. I would seriously suggest that you give your figures some further consideration.

B. *The Agreements made in 1941:* The contracts under which appellees are now operating became effective three weeks before the trial. The new agreements make some changes in the details of the arrangement between the parties. For example, for the first time, Masonite assumes the expense of insurance on the hardboard (Exhibit S-51, Sec. 8, R. 410) and possibly some liability for taxes.[46] For the first time the "agents" are obligated to place signs in the warehouses indicating Masonite's ownership of hardboard; to keep the hardboard properly segregated (Sec. 5, R. 409); and to label the hardboard to indicate that they are acting as "agents".

The fundamental characteristics of the arrangement, however, remain unchanged. Masonite still fixes prices and determines terms and conditions of sale that the "agents" are required to observe. (Sec. 4, R. 408.) The new contracts, like the old, require Masonite to adhere to the same prices and terms and conditions of sale that it prescribes for

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[46] The ambiguity of the provision in the new contract dealing with taxes leaves in doubt the extent of Masonite's obligation in this respect. It provides that Masonite shall pay taxes "imposed upon consignment stock." It also states that the "agent" shall pay all expenses "in connection with, or incidental to," the handling or sale of hardboard; and then provides (Sec. 8, R. 410):

> . . . but Agent shall not be liable for taxes, excises, fees, or other governmental charges which Manufacturer is required to absorb pursuant to any provision of law applicable to sales made hereunder.

its "agents"." Masonite still reserves the industrial field for itself. (Sec. 2, R. 407–408.)

The new agreement still requires the "agent" to indemnify Masonite against all loss and costs sustained by reason of damages to persons or property resulting from the negligent handling by the "agent" of hardboard, including all costs which Masonite may incur in defending any claim asserted against it for these damages (R. 413). The "agent" still bears the full credit risk and is responsible for all accounts. The "agent" is obligated to remit to Masonite on all accounts which remain unpaid for more than sixty days at the last day of the preceding calendar month, regardless of whether it collects from the purchaser. (R. 412.)

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[47] This is clear from the testimony of officers of Masonite, Insulite, Celotex, Certain-teed, National Gypsum, Wood Conversion, Armstrong Cork, and Dant & Russell (R. 523, 621, 627–628, 631, 635, 650–651, 659–660, 668). The provisions of the agreements leave no doubt as to the existence of this obligation. The contract provides that the "agents" shall sell at the prices and upon the terms and conditions established by Masonite and set forth in its published price lists. Copies of the price lists are to be furnished to the "agents" promptly when issued. Masonite is required to give the "agents" not less than ten days' prior notice of the effective date of any increase in selling prices or any changes in terms or conditions of sale if the changes are to make the terms and conditions less favorable than those prevailing, and not less than forty-eight hours' prior notice of the effective date of any decreases in Masonite's selling prices or of any favorable changes in the terms and conditions of sale. (Exhibit S–51, Sec. 4, R. 408–409.)

The new agreement does not change the method of computing the amount that the "agent" must pay to Masonite for the hardboard that it sells. The "agent's" commission is still computed not on the price that it receives for the hardboard it sells, but on Masonite's carlot list price. Thus, the "agent" is still under no obligation to account for the actual proceeds of its sales.[48] (Sec. 13, R. 411, Schedule A, R. 415–416.)

The "agent" remains responsible for storage, cartage, and all other costs in connection with the handling of hardboard in making sales or deliveries[49] (Sec. 8, 409–410).

Although Masonite is required to maintain at the "agent's" plant or warehouse approximately two months' estimated supply of hardboard, the agent still has full discretion concerning the size of the inventory it will carry and is under no obligation to carry a full or rounded stock (Sec. 5, R. 409). Each "agent" maintains and is responsible for its own independent selling organizations, and determines for itself how much time will be

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[48] The 1941 agreement provides that the proceeds of all sales of hardboard "shall be held in trust for the benefit and for the account of" Masonite, but the contract does not expressly require the segregation of the proceeds (Sec. 11, R. 411).

[49] Although Masonite pays the freight on hardboard to the "agent's" warehouse in the first instance, the "agent" is obligated to repay the freight when it receives payment from its customers and remits to Masonite (Sec. 8, R. 409–410, Schedule A, R. 415).

spent on the sale of hardboard and how much money will be devoted to advertising of hardboard. Masonite still makes representations of quality to the "agent" (Sec. 20, R. 413).

Under the new contract Masonite is given the power to demand the return of unsold hardboard at Masonite's expense, but the "agent" is not given the right to return hardboard except on termination of the agreement. (Sec. 6, R. 409.)

The 1941 agreement adds for the first time the following provision (Sec. 22, R. 413):

> Neither the making of this agreement, the acceptance of appointment of Agent hereunder, the performance of any of the provisions hereof, nor the making of any sales hereunder shall constitute or be construed as constituting any person employed by Agent an employee of Manufacturer for any purpose whatsoever.

In defining the relationship between Masonite and its "agents", the 1941 agreements make no reference to a "license"; in this respect they differ in form from the earlier agreements. In the new agreements the agents do not acknowledge the validity of Masonite's patents as they did in the earlier contracts.

C. *Renewal of the Patent Combination by Masonite and Insulite:* At the same time that Masonite and Insulite executed the new "agency" agreement in 1941, they agreed that the contract

made between them on February 1, 1938, whereby Insulite gave to Masonite an exclusive license under all of Insulite's patents relating to hardboard, should be continued in full force and effect until the expiration or cancellation of the new "agency" agreement. (Exhibit S–53A, R. 418.)

IV. MASONITE'S CONTROL OF THE PRICE OF OTHER MATERIALS SOLD IN COMBINATION WITH HARDBOARD

The record shows that hardboard is usually sold in combination with insulation board, roofing and other building materials.[50] Masonite used the "agency" agreements to control the price of insulation board and other building materials sold by its "agents" in combined lots with hardboard. It did this despite the fact that these other products were the property of the "agents" and that Masonite had no proprietary interest of any kind in them and no patent claims covering them. The evidence suggests that from the very beginning of the arrangements Masonite was motivated to some

[50] See page 5, *supra*. Gillies, formerly vice president and general manager of Masonite, testified that "practically all" hardboard was sold in mixed carlots which included insulation board. (R. 493.) Wallace, the vice-president of Masonite, testified that approximately seventy-five (75) percent of all hardboard sold by Masonite was sold in combined lots with insulation board. (R. 524.) Evidence offered on behalf of a number of other appellees was to the effect that they customarily sold hardboard in combined lots with insulation board or other building materials. (R. 594–595, 603, 624, 635, 659, 665.)

degree by a desire to stabilize the price of insulation board.[51]

The intention of Masonite to control the price of insulation board or roofing when sold in combined lots with hardboard, was disclosed in a letter written by Gillies to Harvey, the president of Agasote Millboard Company, on December 28, 1934 (Exhibit 7, R. 799). That letter read in part as follows[52] (R. 799):

> We have, we believe, a lever in this Agency Agreement on Hard Board which enables

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[51] Gillies testified that in discussions that he carried on with representatives of Celotex before the execution of the first agency agreement with that company on October 10, 1933, "in all probability" he threatened to cut prices on insulation board unless Celotex agreed to the "agency" relationship (R. 489). Furthermore, C. F. Ames, Jr., manager of the Building Material Department of Johns-Manville, in a letter dated September 5, 1933, said, with reference to a draft of the "agency" agreement which Masonite had previously submitted to Johns-Manville, "I am sure your action will also result in more stabilized conditions in the Insulating Board market." (Exhibit 24, R. 818.)

In this connection it is interesting to note that Masonite refused to enter into a contract with Flintkote until it handled insulation board. (Exhibit 33, R. 824–825.)

[52] The "Insulation Board Code" referred to in the letter was the code established under the National Industrial Recovery Act. (R. 513–514, 559.) This letter was written while Agasote Millboard Company was still selling Masonite's hardboard.

Masonite's desire to control the price of roofing is also shown by a notice issued to all of its "agents" on December 24, 1934, that read in part as follows (Exhibit 6, R. 798–799):

> It has come to the Manufacturer's attention that certain of the agents are offering for sale hardboard in

us to stabilize the entire industry if properly used. We are trying to make proper use of it.

Only recently we believe one of the concerns reconsidered their decision to sell insulation on a $2 off basis because of the fact that in so doing they would jeopardize their hard board contract and they did not feel that they could get satisfactory dealer representation without hard board. * * *

The Insulation Board Code prohibits the sale of insulation at a reduced price in carload with roofing or other products which are more or less foreign to the Industry. The roofing code, however, permits of giving the carload price on roofing when pooled with other products in carload. This is giving some of the boys a very decided advantage over the others and there wasn't any way under the Insulation Code that we could prevent it. We did feel, however, that we had the means here with the hard board Agency Agreement of making these fellows put roofing back on a competitive basis with the other members of the Industry.

Masonite's intention in this respect was also disclosed by a formal "Notice and Warning" that it sent to the Celotex Company on February

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carload with roofing and offering the roofing in such carloads at the carload brackets, using the lower price thus quoted on the roofing portion of the car as an inducement to secure the order.

We believe this is a violation of both the spirit and letter of the Agency Agreement.

6, 1935[53] (Exhibit 8, R. 800–801). That warning asserted that a sale of any material in combination with hardboard at prices lower than would be charged for the same quantity of the material not accompanied by hardboard, was a violation of the "agency" agreement.

The practice of cutting the price of insulation board and other building materials sold in combination with hardboard was one of the "competitive abuses" that led to the revision of the agreement in 1936.[54] The 1936 agreements contained provisions

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[53] In a letter which accompanied this notice, Gillies stated (R. 800):

> It has recently been the painful duty of the Masonite Corporation in the protection of its own business and that of its del credere Agents to cancel the Agency Agreement and License Option of one of its del credere Agents.
>
> In restoring this agreement to the company in question a full discussion of the entire contract was held and the resulting notice was written by Masonite and concurred in by the Agent in question before restoration of the Agency Agreement and License Option.

In explaining this letter, Gillies testified (R. 497):

> I don't remember that there was any actual cancellation, to the best of my knowledge. This may have been written more or less as window dressing for the Celotex Company with whom we were in constant bickering, if you please, over what we considered were our perfect rights in every situation.

[54] Dahlberg, the president of Celotex, in testifying with respect to the so-called "abuses" which existed in the industry, before the execution of the 1936 agreements, said (R. 582):

> At that time the price of hardboard was fixed under the terms of this del credere agreement. Under that, we as

designed to prevent this kind of price competition in the sale of insulation board, roofing, and other building material. Thus, subparagraph (e) of Section 14 of the agreement provided that the agent should (R. 286):

> not, either directly or indirectly, through discounts, rebates, quantity prices or any other special concession or allowance of any character whatsoever in respect of other merchandise which it may sell or offer to sell, reduce the current minimum selling prices in effect on Manufacturer's hardboard products, either as to class of trade or as to quantity bracket;

The agreement attempted to qualify this provision so far as it applied to insulation board by providing that subparagraph (e) should not be construed to extend to a quantity bid on a combined lot consisting of insulation board and hardboard "it being the intent hereof that such price, bid, or quotation may be at the regular established prices of each such product applicable to the aggregate

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an agent would have to bid $33, for instance, on hardboard, if that was the price. Now, if we were also selling soft board or any of the other types of board, pulp board, and our regular price on that was $25, by making a combined bid the two would be $60—just for easy figuring, and we could make a combined bid of $50 and claim to Masonite that we were charging $35, the regular price on hardboard and were cutting the price actually on soft board, when as a matter of fact we were not doing that at all. That is the abuse that this combined bid illustrates.

quantity of such products and to the class of trade to which such price, bid or quotation is submitted." (R. 286.)

The meaning of the words "regular established prices" in this provision is not clear. The words may mean either (1) the prices for insulation board regularly prevailing in the industry, or (2) the price previously announced by the "agent" for a similar quantity of insulation board sold alone. Whichever meaning is given the words, the clear effect of the provision was to deprive the "agent" of the power to cut prices on insulation board sold in combination with hardboard.

In the 1941 agreements these provisions were eliminated. The only provision of the 1941 agreement that relates to combined bids is found in Section 4 and reads as follows (R. 409):

> Agent shall not sell hardboard products on combined bids or in any other manner which does not fully disclose to the buyer the prices, terms and conditions of sale and delivery on which such hardboard products are offered for sale.

V. PATENTS RELATING TO HARDBOARD

Masonite now owns fifty patents that relate to hardboard or to processes for producing hardboard (R. 174–175). No. 1,663,305 is the only one of these patents that has had the validity and scope of any of its claims considered by the courts.

This patent contains both product and process claims.[55] Masonite's other patents include claims on hardboard as a product, on processes for producing hardboard, and on various machines capable of being used for the production of hardboard. Many of these fifty patents have been acquired by Masonite during the life of the "agency" agreements. (Exhibit S–1 original.)

Insulite at the present time owns fourteen patents relating to hardboard or to methods for its manufacture. (Exhibit I–2 original.) The claims of these patents include claims on the product, on

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[55] Eight of the 26 claims of this patent were considered by the courts in the litigation between Masonite and Celotex that has been described earlier in the brief. (See pp. 10–12, *supra*.) Claim No. 5 of the patent is a typical product claim. It reads (R. 198):

> An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody material, which had been disintegrated into substantially fibrous state, wet, and dried from moist state under consolidating pressure and heat until practically completely freed from moisture, said body being denser than, and comprising practically all the substance of the original wood or woody material.

Claim No. 14 is a typical process claim. It reads (R. 199):

> The process of making a hard, grainless body of wood or woody material which comprises the steps of disintegrating wood or woody material into substantially fibrous material comprising practically all the substance of the original wood or woody material, supplying moisture to said substantially fibrous material, and drying same under consolidating pressure and heat to such extent that the product is not disrupted upon opening the press while still highly heated.

processes for producing the product, and on machinery used in the production. It should be noted that in the evidence offered on behalf of Insulite, there is no concession of the patent supremacy asserted by Masonite (R. 622–629). Celotex now owns eight patents that relate to hardboard (R. 615, 724). These patents also claim the product, processes for producing it and machinery used in production (Exhibit S–26 original). Armstrong-Cork owns a patent whose claims cover a type of hardboard manufactured for the use of a varnish binder (R. 660). The evidence discloses that certain of the appellees have also investigated alternative processes for producing hardboard. This is true of Celotex (R. 646–649) and of Flintkote Company [56] (R. 720–722).

A number of the "agents" offered evidence designed to show that throughout the life of the "agency" agreements they have attempted to develop alternative processes for the production of hardboard (R. 645–649, 666, 720–722). On the other hand, it is not disputed that while the "agency" agreements have been in force not one of the "agents" has attempted to use the patents which it owns, or any alternative process, for the commercial production of hardboard. In explaining their failure to do so, the "agents" do not rely

[56] Flintkote, in its evidence, lists eight alternative processes it has investigated (R. 720–722).

solely upon the asserted supremacy of Masonite's patents. Insulite, for example, explains its decisions to make an "agency" agreement with Masonite on the ground that in 1935 Insulite did not wish to spend the money required to go into the production of hardboard on a large scale. Even now Insulite does not concede dominance to Masonite's patents. (R. 625–627.) Celotex, in explaining why it has failed to make use of an alternative process, states [57] (R. 647):

> This activity * * * terminated in the spring of 1936 because it appeared to Celotex that the cost of production of such material rendered it noncompetitive with Masonite's hardboard product.

THE OPINION, FINDINGS, AND DECREE OF THE COURT BELOW

The trial of the case began in the court below on April 23, 1941, and was concluded on May 1, 1941 (R. 426, 724). On August 8, 1941 the court below held that the bill of complaint should be dismissed. The opinion stated that "the critical question" was whether the separate agreements between appellees were "true" agency agreements, for, if they were, "it cannot be doubted that the case is controlled by the decision of the Supreme Court in *United States* v. *General Electric Co.*, 272 U. S. 476." The opinion then examined the separate

[57] For similar statements by Armstrong-Cork and Flintkote, see R. 660, 721.

agreements and concluded that they were "true" agency agreements. The opinion disposed of the question of monopoly by holding that whatever monopoly Masonite has in the production and sale of hardboard is derived from its ownership of patents, and that there was nothing in the evidence to show that Masonite had "misused any of its patent rights." (R. 843–853.)

On September 26, 1941 the court filed findings of fact and conclusions of law consistent with its opinion (R. 870–884). On the following day the court entered a judgment dismissing the bill of complaint on the merits. (R. 884–885.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the appellees, manufacturers who dominate the market for hardboard and fibre insulation board and who sell in the same market and solicit the same customers, had not contracted, combined and conspired to fix the prices and terms and conditions of sale, to allocate customers and to apportion markets and to suppress competition in the manufacture of hardboard in violation of Section 1 and Section 2 of the Sherman Act. (Assignments of Error Nos. 1, 8–15, 24–26, 32, 33, 36–40, 43–49.)

2. In holding that the agreements between Masonite and the other appellees are bona fide agency agreements and in failing to hold that the agreements were contracts for the purchase and sale of

hardboard whereby the appellees illegally fixed the resale price and terms and conditions of sale, allocated customers and apportioned markets in violation of Section 1 and Section 2 of the Sherman Act. (Assignments of Error Nos. 1–7, 33, 36, 41–43, 58–62.)

3. In holding that appellees had not entered into an unlawful contract, combination and conspiracy to pool and combine patents and patent applications and improperly to use patent privileges for the purpose of controlling subject matter not within the scope of the patent grants and to suppress alternative and competing methods of manufacturing hardboard in violation of Section 1 and Section 2 of the Sherman Act. (Assignments of Error Nos. 16–23, 27–31, 33–35.)

4. In rejecting evidence offered by the appellant. (Assignments of Error Nos. 50–55.)

SUMMARY OF ARGUMENT

I

The appellees have combined to impose upon the market the kind of restraint prohibited by the Sherman Act. The combination has fixed and maintained noncompetitive prices and terms and conditions of sale for hardboard; has divided markets and allocated customers; and has fixed noncompetitive prices for building materials owned by the "agents." All of these activities violate the Sherman Act. *United States* v. *Socony-*

Vacuum Oil Co., 310 U. S. 150; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 456.

The combination has given Masonite a dominant position in the manufacture of hardboard. This has been accomplished, in part, by agreements with Celotex and Insulite that are illegal because they combine and suppress patents for the purpose of eliminating competition. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20. The combination has also restrained competition and manufacture by creating an environment in which the "agents" have no incentive to engage in manufacture.

The combination is the product of common understanding and joint action. It follows that there is no merit in defenses based on the assumption that Masonite acted alone or that it could have achieved the same result by the lawful exercise of its rights as a single trader. *Interstate Circuit* v. *United States*, 306 U. S. 208; *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441.

II

Appellees assert that because the facade of the combination consists of a series of separate so-called agency agreements, the combination is protected by the decision of this Court in *United States* v. *General Electric Co.*, 272 U. S. 476. The argument is unsound. That decision does not confer an absolute immunity upon the agency

relationship. Any limited immunity that the decision creates does not apply in this case because the separate agency agreements here have been used, pursuant to a common understanding, to suppress competition and to fix prices. In any event, the decision in the *General Electric* case does not apply here because the separate agreements do not establish a "true" agency relationship.

III

If our argument under Point II is rejected and the decision in the *General Electric* case confers immunity upon the combination here, then this Court should overrule that decision.

The Sherman Act is designed to deal with the substance of economic relationships so as to protect the public interest in a competitive market and a free economy. Neither the legal fiction of the identity of principal and agent, nor the substantive rules of agency can be of assistance in the solution of problems arising under the Act. Private commercial arrangements should not be permitted to nullify the operation of a public statute of general application. The opinion in the *General Electric* case is vulnerable to criticism, because it attaches excessive importance to the purely private aspects of agency. The decisive test in a case arising under the antitrust laws should be whether there is in fact a common understanding or a joint effort to achieve the kind of economic result that the law forbids.

ARGUMENT

I

APPELLEES HAVE ACTED IN CONCERT TO RESTRAIN TRADE

The purely formal aspect of Masonite's relationship with the other appellees is represented by separate, although identical, contracts by which Masonite designates each of the other appellees its "agent" to sell hardboard. In considering the issues here, however, this Court will not confine its attention solely to matters of form or to isolated transactions; it will consider all of the arrangements between the parties as a whole, and on the basis of that consideration it will appraise the purpose and the scope of the combination and gauge its effect upon the market. *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45–46; *Swift & Company* v. *United States*, 196 U. S. 375, 396; *United States* v. *American Oil Co.*, 262 U. S. 371, 389; *United States* v. *Reading Co.*, 226 U. S. 324, 357–358; *Interstate Circuit* v. *United States*, 306 U. S. 208; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407. And see *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239. When appellees' combination is thus considered, the facts leave little doubt as to its purpose, its scope, and its economic effect. We shall show that the facts support two conclusions: (1) that the combination has imposed upon the market the kind of direct restraint that

is prohibited by the Sherman Act and (2) that this restraint has been achieved by the joint action of appellees.

A. THE COMBINATION HAS IMPOSED UPON THE MARKET THE KIND OF DIRECT RESTRAINT THAT IS PROHIBITED BY THE SHERMAN ACT

1. The combination has fixed and maintained noncompetitive prices and has divided markets

In considering the effect of the combination upon the distribution of hardboard we may begin with the admitted fact that appellees are competitors in the distribution of building materials; they solicit the same customers and sell in the same markets.[58] It is not denied that the combination has established and maintained non-competitive prices and terms and conditions of sale for 95 percent of all of the hardboard made and sold in the United States. Throughout the life of the combination, the other appellees have adhered to prices and terms and conditions of sale fixed by Masonite (R. 190–191); Masonite in exchange has agreed to adhere to the same prices, and terms and conditions of sale.[59] To

[58] See the testimony of Wallace, vice president of Masonite (R. 540, 542). See also Gillies' statement in a letter, dated May 7, 1935, to Sterling Peacock:

> As you know, we have agency agreements with eight or ten of our largest competitors, all of whom are manufacturers of insulation board. (Exhibit A, R. 801.)

[59] The appellees have also adhered to a uniform classification of wholesalers and retailers. (See p. 29, *supra*.)

carry out its obligation, Masonite has so far surrendered its power over its price policies that it cannot change its own prices unless it gives the "agents" notice and permits a specified time to elapse. This kind of agreement is illegal *per se* under the Sherman Act.[20] *United States* v. *Trenton Potteries*, 273 U. S. 392; *Sugar Institute* v. *United States*, 297 U. S. 553; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The agreements reserve to Masonite substantially all sales of hardboard for industrial uses. This is an illegal division of markets. See *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227.

2. *The combination restrained trade by controlling the price of commodities owned by the "agents"*

From the beginning of the combination certain of the appellees were conscious that it could be used to eliminate competition in related building materials as well as in hardboard. Earlier in the

[20] In the court below appellees argued that the prices fixed were not unreasonably high, that they were comparable to the prices of other cheap building materials, and that they did not produce unreasonable profits. The court below made a finding of fact based on these arguments. (R. 883.) It is doubtful whether the facts support the finding. In any case the finding is immaterial. "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destruc-

brief we have referred to the statement made in 1934 by Gillies, vice-president of Masonite, that Masonite had "a lever in this Agency Agreement on Hard Board" that it was trying to use "to stabilize the entire industry." (See pp. 48–49, *supra.*) We have also referred to the prediction made by Ames, an executive of Johns-Manville, that the making of the agreements would "result in more stabilized conditions in the Insulating Board market." (See note 51, p. 48, *supra.*)

In practice the "agency" contracts were used to prevent price competition in insulation board and other building materials sold in combination with hardboard, although it was admitted that these commodities were neither owned by Masonite nor covered by its patent claims. Before the revision of the agreements in 1936, Masonite accomplished this purpose by letters and threats to cancel the "agency" agreements. (See pp. 47–52, *supra.*) The 1936 agreements specifically provided that the "agents" should not grant "discounts, rebates, quantity prices, or any other special concession or allowance of any character whatsoever in respect of other merchandise" sold in combination with hardboard. The agreements purported to qualify this undertaking so as to permit a quantity price on

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tive." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. See also *United States* v. *Trenton Potteries*, 273 U. S. 392, 398; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458.

combined lots of hardboard and insulation board. But even this provision required the parties to sell insulation board at "the regular established prices." [61]

Appellees attempt to defend this practice by arguing that Masonite is entitled to prevent its "agents" from engaging in any competitive practice that had the indirect effect of cutting the price of hardboard. This is doubtless an adequate description of motive; it is not an adequate legal defense. An agreement among appellees to fix the price of insulation board, roofing, or any other building material would be clearly illegal under the Sherman Act. The illegality is not cured by the circumstance that the price-fixing agreement applies to these commodities only when they were sold in combined lots with hardboard. This attempt to use the "agency" to control the price of these other materials is analogous to the

[61] The appellees, apparently recognizing the vice of these provisions, eliminated them in the 1941 agreement and substituted a provision that the "agent" shall not sell hardboard in combined lots or in any manner that does not disclose to the buyer the prices at which the hardboard is offered. Skepticism is permissible as to whether the surface of this provision is an adequate guide to the present intention of the parties. Its purpose is to compel disclosure of the price at which other commodities included in a combined lot are offered for sale. In an industry where the habit of traders has been to offer these commodities at "regular established prices," even this seemingly innocuous provision doubtless will be useful as a means of maintaining noncompetitive prices.

attempt of a patentee to control trade in unpatented materials used in combination with the subject matter of a patent. The Court has consistently condemned that practice. *Carbice Corp.* v. *Am. Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *B. B. Chemical Co.* v. *Ellis*, No. 75, this Term, decided January 5, 1942; *Morton Salt Co.* v. *The G. S. Suppiger Co.*, No. 49, this Term, decided January 5, 1942.

In some instances the combination also controlled the price of hardboard owned by the "agents." When a standard size board was cut either by Masonite at the order of the "agent," or by the "agent" itself, the "agent" was required to pay Masonite the value of the full board, even though both pieces had not been sold. (See pp. 39–41, *supra*.) This meant that the "agent" had in his possession pieces of hardboard for which he had paid and which were his property. Nevertheless, if the "agent" sold these pieces to the building trade, he was required by the agreement to adhere to the prices and terms and conditions of sale fixed by Masonite. This was a clear violation of the Sherman Act.[42] *Bobbs-Merrill Co.* v. *Straus*,

[42] The obligation of the "agent" to pay for the entire board was eliminated as to some varieties of hardboard in 1937. (See p. 40, *supra*.) Appellees' apparently recognizing that this aspect of the agreement was indefensible, completely eliminated these provisions from the agreement on September 1, 1940, nearly four months after the joinder of issue in this case.

210 U. S. 339; *Dr. Miles Medical Co.* v. *Park & Sons*, 220 U. S. 373; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

3. The combination has suppressed competition in the manufacture of hardboard

The result of the combination has been to reserve the manufacture of hardboard as the exclusive province of Masonite. Masonite intended this result and the other appellees have been aware of its intent. Masonite's refusal at the outset to grant a manufacturing license to Celotex or Armstrong Cork (R. 574–575, 588–589, 596, 658); its offer of a license option with terms and conditions so onerous that the other appellees could not, as a practical matter, take advantage of it (see pp. 41–42, *supra*); its purchase of the press used by Insulite to manufacture hardboard (see p. 20, *supra*); and its announced desire to get "everybody in the same bed and under the same blanket" (see p. 19, *supra*), leave little doubt on this point.

The arrangements made by Masonite, Insulite, and Celotex with respect to their patents provided a firm basis for the suppression of competition in manufacturing. The agreement, made in 1938, that gave Masonite an exclusive royalty-free license under all of Insulite's patents and barred Insulite from practicing its own inventions, was a formal combination of competing patents for the purpose of suppressing competition. (See pp. 21–22, *supra*.) Celotex as a result of its agreement with

Masonite, withdrew its petition for a writ of certiorari, abandoned assertion of its own patent claims, and ceased to manufacture hardboard under its patents. So far as concerns the effect upon competition, this arrangement accomplished the same purpose that would have been served had Celotex granted an exclusive license to Masonite. The transactions with both Insulite and Celotex, therefore, fall within the scope of the rule that condemns any combination of patents, or any agreement to suppress their use that is designed to prevent competition or to support a price-fixing arrangement. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 47; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 174, 175; *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 562, (D. Mass.); *United States* v. *New Departure Mfg. Co.*, 204 Fed. 107 (W. D. N. Y.); *Lynch* v. *Magnavox Co.*, 94 F. (2d) 883, 890 (C. C. A. 9.)

Appellees seek to explain these arrangements as normal compositions of conflicting patent claims. This explanation cannot stand against proof of a purpose to suppress competition. We have seen that after the decision of the district court in the patent litigation representatives of Celotex and Masonite met and discussed the possibility of suppressing competition by a combination of patents. (See p. 10, *supra*.) At that time it was said that the decision of the district court "hadn't left anybody with anything," that "there was no way in

which we could license anybody and give them the necessary price protection as well as secure it for ourselves," and that "by a pooling of patents * * * it might be possible to set up some kind of price control." Those statements are not consistent with appellees' present assertion that they were merely interested in avoiding the burdens of patent litigation. This assertion carries equally little weight when made in respect to the arrangements with Insulite. Insulite initially abandoned assertion of its patent claims in 1935 even before issue had been joined in its litigation with Masonite. It specifically limited its acknowledgment of the validity of Masonite's patents to the life of the "agency agreement." In 1938 Insulite agreed not to use its own inventions to compete with Masonite so long as the "agency" agreement was in effect. These circumstances all demonstrate a purpose on the part of both companies to suppress competition in the manufacture of hardboard.

In any event, the description of these arrangements as compositions of conflicting patent claims does not meet the present criticism. The fact that persons have competing patent claims and wish to adjust their differences creates no special immunity under the Sherman Act. A contract of compromise is subject to the statute like any other contract, and if it is used to suppress competition or to fix prices, as these arrangements were, the contract is illegal. *Standard Oil Co.* v. *United States,* 283 U. S. 163,

174, 175; *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38 (C. C. A. 3).

So far, we have explained the restraint upon competition in manufacture solely in terms of the patent arrangements made by Masonite with Celotex and Insulite. There is a broader aspect of this restraint, however, that requires comment. Most of Masonite's "agents" were engaged in making commodities, particularly insulation board; that were produced from raw materials and by the use of machinery and processes similar to those used to produce hardboard. (R. 605, 626, 656–657, 658, 715.) They were selling to dealers who wished to buy hardboard and other building materials from the same supplier (R. 595, 603, 625, 633, 659, 665). In normal conditions these circumstances would have created a strong incentive for the "agents" to manufacture hardboard. The combination substantially reduced the force of this incentive by offering the "agents" an assured supply of hardboard and establishing a noncompetitive market in which to sell it.

The "agents'" own testimony shows that the combination had this effect. A number of the "agents" sought to show that they had attempted to find an alternative way of producing hardboard that could be used in competition with Masonite and that they were deterred only by fear of Masonite's patents. The "agents'" statements, however, show that the motives that frustrated

these efforts were colored as much by commercial considerations as they were by fear of Masonite's patents. We are told that the cost of the alternative process was "too great," or that the cost of the product made it "noncompetitive" with Masonite's hardboard, or that the alternative process was not "commercially or economically feasible" for use in competition with Masonite. (See pp. 54–55, *supra*.) The testimony offered for Insulite is significant in this connection. That testimony does not suggest that Insulite could not produce hardboard successfully on a commercial scale under its own patents; or that Insulite ever conceded that Masonite's patents in fact are dominant; or that any belief in their dominance prompted Insulite to join the combination (R. 622–629).

It was a commercial choice as well as a judgment as to the patent law that kept appellees from manufacturing hardboard. The commercial choice was conditioned by the environment created by the "agents'" adherence to the combination. In that environment the risks involved in producing hardboard for sale in a competitive market doubtless seemed less attractive to the "agents" than the prospect of a continuing supply of hardboard from Masonite, coupled with the assurance of a regimented and noncompetitive market in which to sell it. In this respect, the restraint acted upon potential and not existing competition, but the illegality is as great in the one case as in the other.

Standard Oil Co. v. *United States,* 221 U. S. 1, 74–75; *United States* v. *Reading Co.,* 226 U. S. 324, 353; *Swift & Company* v. *United States,* 196 U. S. 375, 396.

Appellees will doubtless attempt to meet this criticism by asserting that if the manufacture of hardboard has been restrained, it has not been by the combination but by Masonite's dominant patents. We have seen that the "agents'" own testimony refutes this argument. Moreover, this contention ignores the fact that the fulcrum of the combination does not consist of Masonite's patents alone; it is also based on Insulite's patents and the suppression of the patents of Celotex. The *de facto* supremacy enjoyed by Masonite's patents was created by the voluntary act of the parties and not by a definitive decision of the courts.

In any event this combination has had a more restrictive effect than could have been accomplished by the legal use of patents alone. This can be shown by consideration of the possible avenues open to Masonite for the exercise of its patent privilege. Assuming that Masonite was determined to avoid all price competition in the sale of hardboard, it might have used its patents in one of two ways. It might have reserved to itself the exclusive right to make, use, and vend hardboard. Had it done so, the other appellees would have been impelled by powerful stimuli either to contest the validity and scope of Masonite's patents, and to

carry that contest ultimately to this Court, or else to devise an alternative process or product that would avoid Masonite's patent claims. In either case Masonite could hardly have hoped to maintain its monopolistic position.

On the other hand, Masonite might have granted manufacturing licenses that fixed the prices at which the licensees could sell. This course of action had obvious shortcomings as a method of maintaining Masonite's monopolistic position.[83] The other appellees, as licensees, would then have obtained equipment for manufacture and experience in its use. That equipment and that experience would have provided a greater opportunity for the development and commercial exploitation of a competing hardboard than is afforded by the present combination. Moreover, as Masonite's patents expired, the other appellees, with the necessary equipment and with ample experience in manufacture, would have been fully prepared to engage in competition.[84] By contrast, the present combination leaves the "agents" at the end of the patent period without machinery or manufactur-

[83] To defend licenses of this kind Masonite would have had to rely upon that part of the decision in the *General Electric* case that upheld the license arrangement between General Electric and Westinghouse. In its brief filed in *United States* v. *Univis Lens Co.*, Nos. 855, 856, this Term, the Government has asked this Court to reconsider that branch of the *General Electric* decision.

[84] The testimony of Alexander shows that Masonite was conscious of the threat of competition at the end of the patent period (R. 681).

ing experience, and faced with the prospect of competing with a company that for several years has produced 95 percent of all the hardboard sold in this country.

B. THE COMBINATION HAS BEEN FORMED AND CARRIED OUT BY THE JOINT ACTION OF APPELLEES

The combination was not the creation of Masonite alone; the other appellees were active participants, and not unwilling or unconscious actors, in its formation and execution. All of the appellees were aware of the extent of the plan, its general characteristics, and the nature of the concerted action that it involved. In the very early stages of the combination, each of the appellees, then participating, knew that its contract with Masonite was not an isolated transaction but a part of a larger scheme. There may be room for debate as to the exact point of time at which some of the appellees became aware of this circumstance and as to the precise extent of their knowledge at the moment when they signed contracts with Masonit.[65] But there can be no doubt that as the com-

[65] Celotex, for example, denies that its representatives knew when they executed the first *del credere* contract with Masonite in October 1933, that Masonite intended to make similar contracts with other companies. It admits, however, that its representatives were informed of this fact "almost immediately after" the execution of the contract (R. 578).

A number of the appellees, notably Johns-Manville Sales Co. (R. 601), Armstrong Cork (R. 658), Wood Conversion

bination continued, each of the "agents" became familiar in detail with its purpose and scope."

The circumstances surrounding the renewal of the agreements in 1936 and 1941 leave no doubt as to the extent and character of appellees' knowledge of the scope and purpose of the combination. In 1936 each of the appellees then a party to the combination signed an escrow agreement that expressly provided that the "agency" agreement with Masonite was to become effective at the same time as the identical contracts between Masonite and the other

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(R. 630), National Gypsum (R. 632), and Insulite (R. 627), knew when they signed the first agreements with Masonite that it had either executed or proposed to execute identical agreements with other companies.

Dant & Russell and Flintkote did not become parties to the combination until 1937. (See p. 26, *supra*.) Both companies knew when they signed the contract with Masonite that similar *del credere* agency agreements existed between Masonite and the other appellees (R. 635, 717). Flintkote, although it admits that it knew of the arrangements with the other appellees, denies that it had any precise knowledge as to the terms of those arrangements when it executed its first agreement with Masonite (R. 717).

" The evidence shows that as Masonite signed each "agency" agreement, it sent a copy of that agreement to its existing "agents" (R. 621). The agreements provided that if Masonite should make any agency agreement on terms more favorable than those contained in the agreement, the "agent" should be entitled to have the benefit of those more favorable terms or provisions and required Masonite to furnish the "agent" promptly with copies of all agency agreements made with other persons. (R. 233, 253, 255, 257, 260, 294.) There was no comparable provision in the 1937 agreements with Flintkote and Dant & Russell.

appellees named in that agreement. In 1941 the terms of the new agreements were drawn in conferences attended by representatives of all of the appellees. On these facts, without more, the record establishes the kind of agreement and joint action that falls within the scope of the statute.[67] *Interstate Circuit* v. *United States*, 306 U. S. 208, 225–227.

It will doubtless be suggested that even though the "agents" acted with knowledge of all the facts, their role was passive, that they acquiesced and did not create, and that the arrangement was the product of Masonite's mind and will alone. The

[67] Appellees' defense to the charge that they acted jointly consists largely of self-serving declarations as to the innocence of their motives. We are told that the single appellees "did not intend" to join in any combination in restraint of trade or that they "did not intend" to fix prices or to monopolize the manufacture or distribution of hardboard. (For example, see R. 627, 662, 668, 708.) They admit, however, that they intended to commit the particular acts complained of, and it is clear that they knew what the consequences of those acts would be. Appellees' self-serving declarations cannot outweigh the evidence as to what they actually did. *United States* v. *Patten*, 226 U. S. 525, 543; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485–486.

Appellees also make a point of the fact that they never consulted with Masonite with respect to prices and that the prices were fixed by Masonite alone. (For example, see R. 628, 631, 635, 669, 709.) But a combination that delegates to one of its members the power to fix a price that all members observe is just as illegal as a combination that contemplates that all members will participate directly in the selection of particular prices. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.

record will not support this suggestion. Masonite was in no position to impose its will arbitrarily upon all of the other appellees. To achieve Masonite's purpose, it was necessary to persuade both Celotex and Insulite to abandon assertion of their own patent claims. This required concessions on the part of Masonite. The evidence shows that the first agreement between Masonite and Celotex, which served as a model for all of the other agreements, was the result of protracted negotiations in which Celotex's power of choice was exercised."[48]

Even those companies that own no patents, and whose position was not so strong as that of Celotex and Insulite, played a part in the drafting of the provisions of the 1936 and 1941 agreements. If this is not so, the joint conferences and the negotiations in which those agreements were framed were pointless."[49] That the combination was the product of a union of wills, and not simply of Masonite's will alone, is strikingly demonstrated by the provisions of the contracts that required Masonite to adhere to the prices it prescribed for the "agents." There is no doubt that this aspect of the combination was the result of

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[48] See Dahlberg's testimony on this point (R. 574–577); see also the lengthy letter he wrote to Gillies, dated September 20, 1933, making suggestions about various provisions in the proposed contract (Exhibit 23, R. 811–818).

[49] It is interesting to note that each time the agreements were revised Masonite found it necessary to increase the amount of the "agent's" commissions (R. 239, 279, 416).

insistence by the "agents."[70] Masonite had to consent to this restriction upon its own freedom of action to obtain the assent of the other appellees to the combination. The avowed purpose of the restriction was to protect the other appellees against Masonite's competition, although it is apparent that appellees had doubts as to the legality of this purpose under the Sherman Act.[71] (See pp. 29–30, *supra.*)

Much of appellee's argument below was directed to showing what Masonite legally might have done if it had acted alone. These arguments are immaterial because the facts establish common agreement and joint action on the part of all the appellees. Whatever Masonite might have done, acting alone, or whatever its rights as a single trader may be, the statute does not permit it to join with the other appellees in a contract or combination, express or implied, to achieve purposes that the law forbids. *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441, 452–453; *Binderup* v. *Pathe Ex-*

[70] Dahlberg's testimony is explicit on this point (see p. 17, *supra*). See also the letter written by counsel for Masonite to Wood Conversion Company on October 20, 1936, quoted on pp. 29–30, *supra.*

[71] The decision in *Interstate Circuit* v. *United States*, 306 U. S. 208, shows that these doubts were well founded. There the Court held that an agreement by a copyright owner limiting his own competitive power for the purpose of protecting his licensee from competition could not be justified as an exercise of the copyright privilege.

change, 263 U. S. 291, 312; *Interstate Circuit* v. *United States,* 306 U. S. 208. Cf. *United States* v. *Colgate & Co.,* 250 U. S. 300.

II

THE COMBINATION CANNOT BE JUSTIFIED UNDER THE DECISION OF THIS COURT IN *UNITED STATES* V. *GENERAL ELECTRIC CO.,* 272 U. S. 476

A. THIS COMBINATION IS ILLEGAL EVEN THOUGH THE SEPARATE AGREEMENTS MAY BE REGARDED AS ESTABLISHING AN AGENCY RELATIONSHIP FOR SOME PURPOSES

We have shown that the substance of the combination here involves the kind of concerted action to restrain trade that is illegal under the Sherman Act. It follows that unless some immunity results from the form of the combination, the United States is entitled to the relief sought in the bill of complaint. Appellees seek immunity in the decision of this Court in *United States* v. *General Electric Co.,* 272 U. S. 476.

In that case the Court considered the legality of agency contracts made by General Electric with wholesale and retail distributors of incandescent lamps. The contracts required the agents to observe prices and terms and conditions of sale fixed by General Electric.[12] The Court held that the contracts did not violate the Sherman Act.

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[12] A detailed comparison of the provisions of the contracts in the *General Electric* case with the provisions of the contracts here is contained in the Appendix of this brief, pp. 109–117, *infra.*

In reaching this result this Court took the view that it was dealing with a very elementary form of agency. Although the lamps were in the hands of the agents, they were the property of General Electric, and the act of the agents in delivering the lamps to customers was in fact the act of General Electric.[73] Thus, the Court seems to have assumed that the situation was the same as it would have been had General Electric simply increased the number of its servants or employees and distributed all of its lamps through them.[74] On this view of the facts General Electric had done nothing more than set up a distribution system that was confined in its effects to the operations of a single business unit. The decision assumes that General Electric could administer its own internal cor-

[73] The Court said: "The plan was of course devised for the purpose of enabling the company *to deal directly with consumers and purchasers* . . ." (272 U. S. 476, at p. 483), and, "The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust Law, by seeking *to dispose of his article directly to the consumer* and fixing the price by which his agents transfer the title from him directly to such consumer" (272 U. S. 476, at p. 488). [Italics supplied.]

[74] The Court answered objections to the size and comprehensiveness of the distribution system by pointing out that the patents of General Electric were "basic" and that consequently it had by statute a complete monopoly in the United States of making, using, and selling incandescent lamps. (272 U. S. at pp. 484, 485.) In other words, the Court appears to have concluded that the distribution system imposed no real restraint upon the market because General Electric's patents permitted it to exclude everyone else from selling lamps.

porate affairs and fix the price of its own property without running afoul of the statute."[15]

The opinion seems to have regarded the distribution system as the creation of General Electric alone, and the agents as little more than inert instruments of its will. In support of this assumption it could be urged that there were more than 21,000 of the agents; that they were a diverse and motley group, incapable of acting jointly to pursue a common purpose; and that they were disabled by their economic status from exercising any deliberate choice as to the character of the system under which they would receive lamps from General Electric."[16]

There was no occasion for the Court to consider whether the system restrained competition between General Electric and its agents. The agents were not manufacturers of incandescent lamps, they had never engaged in that business, and their economic condition obviously made that activity impossible."[17]

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[15] But see *United States* v. *General Motors Corporation*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, October 13, 1941, No. 352 this Term.

[16] An examination of the record and briefs in *United States* v. *General Electric Co.* shows that the Government never contended that the distribution system was in any real sense the product of common understanding or joint action on the part of General Electric and its agents. Even on the Government's view of the case, the agents merely acquiesced in a choice made by General Electric. But compare *Interstate Circuit* v. *United States*, 306 U. S. 208.

[17] The Court described the agents as persons "who ordinarily and usually would be merchants buying from the manufacturer and selling to the public" (272 U. S. at p. 483).

Although General Electric sold lamps through its own salaried employees, it is a fair inference from the record that those sales were not made in the same markets or to the same customers ordinarily served by the agents."[78] Thus, General Electric and its agents did not operate on the same competitive level either as to the manufacture or the marketing of lamps.

The court below concluded that the *General Electric* decision was controlling and stated its conclusion in these words (R. 847):

> The critical question is whether the agreements are true agency agreements, for, if they are, it cannot be doubted that the case is controlled by the decision of the Supreme Court in United States v. General Electric Company, 272 U. S. 476.

This view necessarily assumes either (1) that the *General Electric* decision gives immunity to all restraints of trade accomplished by the agency relationship, or (2) that even though the immunity is limited, the facts here are so similar to the

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The agents were divided into two classes and designated as A and B agents. There were 400 B agents, and they are described in the opinion as "large distributors." The 21,000 A agents are described as "usually retail electrical supply dealers in smaller places." (272 U. S. at page 483). The record does not show that any of the agents owned patents relating to the manufacture of lamps. (*United States* v. *General Electric Co.* No. 113, October Term, 1926. R. 91, 95.)

[78] The facts as to General Electric's own sales as compared with those of its agents appear in the stipulation of facts. (See *United States* v. *General Electric Co.*, No. 113, October Term, 1926, R. 92–95.)

facts in the *General Electric* case that the decision there is controlling.

The suggestion that the *General Electric* decision gives an absolute and unqualified immunity to the agency relationship is indefensible. This suggestion assumes that the Court ignored the fact that the words of the statute make no distinction between agency and any other legal relationship but, on the contrary, outlaw "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." In other words, we are asked to treat the decision as if it were a statutory amendment expressly conferring upon agency an immunity purely formal in origin, highly artificial in operation, indefinite in scope, and virtually unlimited in its practical consequences.[79] Neither the language of the opinion nor the doctrine of *stare decisis* justifies this conclusion. In the *General Electric* case the Court did not deal with legal relationships in the abstract; it approved a particular use of the agency device. The limits of that approval are fixed by the Court's interpretation of the facts with which it was deal-

[79] In a later section of this brief, we argue that if the decision in the *General Electric* case must be construed as conferring a broad immunity upon the agency relationship, the doctrine of the case requires reconsideration and redefinition. That argument will show that because of its origin, its character, and its usual employment, the agency relationship is not a satisfactory guide in the solution of problems arising under the antitrust laws. (See pp. 98–108, *infra*.)

ing, and the decision should not be pressed beyond those limits.

It may be argued that even though the immunity given by the *General Electric* decision is limited in scope, it nevertheless applies in this case. This argument is sound only if the record now before the Court will support an interpretation of the facts similar to the interpretation that the Court adopted in the *General Electric* case.[80]

A comparison of the facts in the two cases should begin with the recognition that appellees occupy a position strikingly different from that of General Electric and its agents. Appellees are a small group of large companies engaged in manufacturing and selling building materials. (See pp. 7–8, *supra.*) They operate on the same competitive level, both as to the general character of the commodities they make and as to the markets in which they sell. Before the combination was born, three of the appellees, Masonite, Insulite, and Celotex, were actively engaged in the manufacture and sale of hardboard. One immediate effect of the combination was to eliminate the competition of Insulite and Celotex. These two companies owned patents that threatened the success of the arrangement and collateral agreements were required to

[80] It is arguable that in making the assumptions that underlie its reasoning in the *General Electric* case, the Court did not examine the facts before it with a sufficiently critical eye. For a critical examination of the opinion in the light of the facts, see Klaus, *Sale, Agency and Price Maintenance*, 28 Col. L. Rev. 312, 441.

suppress the threat. There was nothing even remotely resembling this circumstance in the *General Electric case.*[81] There General Electric owned three patents that the Government conceded were basic, if valid, and the validity of the patents had been repeatedly sustained in contested litigation.[82]

We have pointed out that the combination here has not been achieved simply by the use of Masonite's patents and that it has had a more restrictive effect than could have been accomplished by the lawful use of those patents. (See pp. 71–73, *supra.*) It follows that the Court cannot justify the scope and effect of the scheme here, as it did in the *General Electric* case, by reference to the patent privilege.

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[81] It is true that General Electric had a cross-licensing agreement with Westinghouse. In the second branch of its decision the Court held that contract legal, basing its decision squarely upon the patent law.

It appears from the Government's brief in the *General Electric* case that it did not attack the agency contracts on the ground that they were a part of a larger plan, including the cross-licensing agreement, that was designed to suppress competition. The Government seems to have taken the position that the agreements between General Electric and its agents were illegal considered by themselves and quite apart from the patent arrangements with Westinghouse.

For a discussion of the branch of the *General Electric* decision that related to the license agreement, see the brief filed by the United States in *United States* v. *Univis Lens Co.*, Nos. 855, 856, this Term.

[82] The Government's concession as to the patents appears on pages 5 and 6 of the brief for the United States. A tabulation of the litigation in which General Electric's patents has been sustained appears at page 59 of the brief filed by the General Electric Company.

Furthermore, in this case all of the "agents," unlike the agents in the *General Electric* case, are potential competitors of their alleged principal and the effect of the combination has been to remove their incentive and their opportunity to compete. (See pp. 66–73, *supra*.) The economic power and the competitive position of Masonite's "agents" make it impossible for the Court here to indulge in the assumptions made in the *General Electric* case: the "agents" cannot be regarded as servants or paid employees; it cannot be assumed that Masonite is using them to sell "directly" to consumers; the arrangement between appellees cannot be regarded as a vertical distribution system confined in its effects to the operations of a single business unit. It may well be that for the purpose of adjusting the private rights of Masonite and the other appellees, their relationship can be described as an "agency." But whatever merit this description may have for that purpose, it cannot conceal the fact that this is a combination among competitors to suppress competition.

Appellees' insistence upon the existence of an agency also fails to conceal the obvious fact that this combination is not the result of any exertion of Masonite's will alone. The "agents" were not passive or acquiescent instruments in Masonite's hands; unlike the scattered and diverse group in the *General Electric* case, the "agents" here are a coterie of powerful companies and they have not

hesitated to use their power to influence the form and substance of the combination. The 1941 contracts, for example, were prepared in conferences attended by all of the appellees; there is no parallel circumstance in the *General Electric* case. The difference between the two situations is well illustrated by the fact that the "agents" here have always insisted that Masonite sell at the same prices that it prescribed for them and that it adhere to those prices unless it gave notice and permitted a specified period of time to elapse.[82a]

Finally, there was no evidence in the *General Electric* case, as there is here, that in pursuit of a purpose to suppress competition and to restrain trade the parties fixed collusive prices for commodities that admittedly fell outside the scope of the alleged agency relationship. (See pp. 62–66, *supra.*)

It can hardly be denied that substantial and decisive differences exist between the facts here and those in the *General Electric* case. The differences between the two cases indicate that the restraint here is more direct and more substantial than the Court believed it to be in the *General*

[82a] Although General Electric agreed to give its agents notice of changes in the prices they were required to observe it was free to charge any price it pleased in its own sales. In the license agreement with Westinghouse, General Electric agreed to observe in its own sales the prices prescribed for Westinghouse. This provision, however, was defended as an exercise of the patent privilege and not as a lawful incident of an agency relationship; in fact, it was not suggested that any agency existed between General Electric and Westinghouse.

Electric case, that the effect of the combination here upon the market has been more restrictive than it had been there, and that the activities of appellees involve a kind of joint action and common agreement that the Court assumed was absent in that case. These facts all bear upon the purpose, the scope and the economic effect of the combination. By well settled rules these considerations are decisive of the status of appellees' activities. In the balance against these factual differences appellees can throw only the argument that this case, like the *General Electric* case, involves an agency agreement by which the "principal" purports to fix the prices at which the "agents" sell. This similarity in form is not enough to overcome the realities of the situation. A case under the Sherman Act should be decided by "a close scrutiny of its own facts" (*Sugar Institute* v. *United States*, 297 U. S. 553, 600) and not by the mechanical application of an abstraction or the uncritical acceptance of some "disguise or subterfuge of form." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181. And see *United States* v. *American Oil Co.*, 262 U. S. 371, 389."

" Cf. the concurring opinion of Mr. Justice Brandeis in *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 27–28:

> Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles.

B. THE AGREEMENTS DO NOT ESTABLISH A "TRUE" AGENCY RELATIONSHIP

We have seen that the court below took the view that the decisive issue in this case was whether the separate agreements were "true" agencies. (See p. 81, *supra*.) We believe that this distinction between "true" and "spurious" agencies serves no useful purpose in a case of this kind, because it is an attempt to solve an antitrust problem by the application of irrelevant criteria. The apparent clarity of the distinction is illusory, because the raw material of the law does not always fit easily and neatly into one or the other of the two categories. (See pp. 102–103, *infra*.) But if we overlook these objections and for the moment accept the distinction, the conclusion of the court below is still erroneous because the separate agreements here are not "true" agencies.[44]

In determining whether a "true" agency exists for the purpose of immunity from the antitrust

[44] For the purposes of our argument it is unnecessary to attempt to place the relationship in any one definite legal category. The contracts bear many of the indicia of contracts for sale. They may be a kind of conditional sale transaction in which Masonite reserves the right to retake the goods in the event of nonpayment or bankruptcy. Viewed in this light, the entire effect of the arrangement would be to protect Masonite against the claims of other creditors of the "agents." Another possibility is that the "agents" are in fact independent contractors and not the kind of agents the Court assumed existed in the *General Electric* decision. (See pp. 91–98, *infra*.)

laws criteria are relevant and important that would be of less consequence if the only issue were the adjustment of the private rights of the parties to the arrangement.[88] Cf. *Morton Salt Co.* v. *The G. S. Suppiger Co.*, No. 49, this Term, decided January 5, 1942. Conversely, matters that might be of great weight in adjusting the private obligations of the parties to the arrangement, are of little significance in an antitrust case. For example, in cases where the only issues relate to private rights and obligations the fact that the alleged principal controls the price at which the alleged agent sells is sometimes taken as indicating the existence of the agency relationship. On the other hand, here the point at issue is whether the antitrust laws permit Masonite to control the prices at which the other appellees sell. Assertion by Masonite of that control is not a proper basis for an argument that the arrangement is exempt from the antitrust laws.

In this case, moreover, the question of intent possesses a peculiar importance. In dealing with private rights and obligations, the intent of the parties is important only as it assists the Court to interpret the agreement between them. On the

[88] The fact that an agency relationship may exist for some private purposes between the parties does not necessarily mean that it exists for the purpose of conferring immunity under a statute designed to protect the public interest. See *United States* v. *San Francisco*, 310 U. S. 16, 28; *Gray* v. *Powell*, No. 18, this Term, decided December 15, 1941. And see Point III, *infra*.

other hand, where, as here, persons assert that agency, as a relationship, confers immunity under the antitrust laws, the Court is entitled to weigh their intent not only as it relates to their private rights and obligations but also as it relates to the public purpose embodied in the statute. When the facts disclose that the dominant motive of the parties is to use the agency relationship not for some normal commercial purpose but to fix prices and to suppress competition, the Court should look through form and scrutinize severely the substance of the arrangements.[88] See *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490, 498; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181.

It is against the background of these considerations that we should apply the standards normally used in private law to determine the existence of an agency. In the application of these standards there are certain general rules that the courts observe. In the first place, the courts look at the contract as a whole. They do not isolate particular provisions from their context and determine whether those particular provisions, quite apart from everything else in the agreement, are consistent with the existence of an agency relationship. *Heryford* v. *Davis*, 102 U. S. 235, 243–244.

[88] This is not to say that a specific intent to take proper advantage of a statutory immunity will deprive a person of any right that the statute gives; but specific intent may, in appropriate cases, be a weighty consideration in determining the scope of the immunity the statute creates.

In the second place, the terminology used by the parties is not controlling. *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490, 498; *In re United States Electrical Supply Co.*, 2 F. (2d) 378, 380 (S. D. Ill.); *In re Wells*, 140 Fed. 752 (M. D. Pa.); *D. M. Ferry & Co.* v. *Hall*, 188 Ala. 178, 186–187 (1914). If we accept these two general rules of construction and apply the criteria of private law, it becomes apparent that the separate agreements here are not "genuine" agencies for at least three reasons:

1. *The "agents" have no power to change the legal relations between Masonite and third parties:* One of the distinguishing marks of the agency relationship is the power of the agent to change the legal relations between the principal and third parties. *Restatement of the Law of Agency*, Sec. 12; Seavey, *The Rationale of Agency*, 29 Yale L. J. 859, 868; *McMaster, Inc.* v. *Chevrolet Motor Co.*, 3 F. (2d) 469, 474 (E. D. S. C.); *Columbia University Club* v. *Higgins*, 23 F. Supp. 572, 574 (S. D. N. Y.).

The agreements not only did not expressly confer upon the "agent" the power to affect Masonite's legal relations with third persons but denied them that power so far as possible. In fact, Section 22 of the agreement made in 1941 provides that neither the making of the agreement, the acceptance of the appointment of an "agent," the performance of

any of its provisions, nor the making of any sales "shall constitute or be construed as constituting any person employed by the Agent an employee of Manufacturer for any purpose whatsoever." (R. 413.) Moreover, Masonite never intended to assume ultimate responsibility for any acts of the "agents" because it required them to indemnify it against all damages resulting from injuries to persons or property arising out of the handling of hardboard [87] (R. 413). The practical effect of these provisions is to insulate Masonite against responsibility both for the negligent acts of its "agents" and for any contractual obligations that they may assume.

The parties never contemplated that Masonite would have any legal relations with the "customers" of the "agent." [88] Before 1941 the contracts carefully distinguished between the "customers" of the "agents" and the "customers" of Masonite.[89] Because of the *del credere* aspect of the arrangement

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[87] This provision was added to the agreements for the first time in 1936.

[88] Prior to the Spring of 1941 the other appellees sold hardboard under their own trade names and, with some exceptions, there was no disclosure that they were acting as "agents" for Masonite. As long as the "agents" followed this course of conduct, they were developing good will for their own trade names and not for those of Masonite.

[89] For examples of distinction, express or implied, between the customers of Masonite and those of the "agents," see the following provisions of the 1936 agreement: paragraph 5 (R. 272, 273, 274); paragraph 3 (R. 270); paragraphs 8 and 9 (R. 280, 281); paragraph 13 (R. 285).

the "agent" bore the entire credit risk and Masonite never looked to the "agent's" customers for payment.

2. *The agreements did not constitute the "agent" a fiduciary:* Another test of the existence of an agency relationship is whether the "agent" is a fiduciary acting primarily for the benefit of another in connection with his undertaking. *Restatement of the Law of Agency,* Sec. 13; Seavey, *The Rationale of Agency,* 29 Yale L. J. 859, 868; *Wadsworth* v. *Adams,* 138 U. S. 380, 389; *Stephens* v. *Gall,* 179 Fed. 938, 941 (D. Kan.); *Carcaba* v. *McNair,* 68 F. (2d) 795, 797 (C. C. A. 5); Mechem, *Agency* (2d ed. 1914) par. 1188.

No fiduciary relationship exists between Masonite and its "agents." The "agents" are not obligated to account to Masonite for the proceeds from the sale of hardboard; on the contrary, they pay a fixed price for the hardboard shipped to them. Remittance is made to Masonite on the basis of the carlot list price, less a commission, even though the "agent" sells the hardboard at the higher prices fixed for less-than-carlot quantities. (See pp. 36–38, 45, *supra.*) The obligation to pay a price determined without reference to the amount of money collected from the "agent's" customer indicates that no agency exists. *In re Leflys,* 229 Fed. 695 (C. C. A. 7); *In re Wells,* 140 Fed. 752, 754 (M. D. Pa.). See also *Howard* v. *Hancock Oil Co. of California,* 68 F. (2d) 694, 697–698 (C. C. A. 9), *Stand-*

ard Co. v. *Magrane-Houston Co.*, 258 U. S. 346; *Smokeless Fuel Co.* v. *Western United Corporation*, 19 F. (2d) 834, 836 (C. C. A. 4).

The agreements do not assume any fiduciary duty on the part of the "agent" to account to Masonite for the proceeds of sales. Under the agreement the "agent" is free to mingle the proceeds with his own funds. Failure to provide for segregation and the fact that payment is made from general funds suggests the absence of a fiduciary relationship.[20] *In re Wells*, 140 Fed. 752, 754 (M. D. Pa.); *In re United States Electrical Supply Co.*, 2 F. (2d) 378, 380 (S. D. Ill.); *In re Leflys*, 229 Fed. 695, 697 (C. C. A. 7).

The agreements do not obligate the "agent" to disclose information to Masonite with respect to matters involved in the agency. The "agent" is not required to report the names of its customers or other commercial information to Masonite. Under the agreements in effect between 1933 and 1941, Masonite was forbidden to use its power to audit the books of the agents for

[20] The 1941 agreement provides in Section 11 that the proceeds of all hardboard sold "shall be held in trust for the benefit and for the account of" Masonite (R. 411). No provision of this kind appears in the earlier agreements. There is still no requirement in the contract that the "agents" segregate the proceeds of sale. Moreover, the substance of the provision is inconsistent with the method of payment provided for in the contract; the "agents" still do not account to Masonite for the proceeds of sale but simply remit a percentage of Masonite's carlot list price.

the purpose of securing commercial information. The 1941 agreement gives Masonite the power to audit the books of the "agent" pertaining to hardboard and contains no limitation as to confidential trade information. It may be doubted whether this change reflects any intent to change the actual practice of the parties; the right of audit has not been exercised by Masonite since 1935. The fact that the "agents" may preserve an arms-length relationship by withholding information creates doubt as to the existence of a fiduciary relationship. *Ingram* v. *Fidelity-Phoenix Fire Ins. Co. of New York,* 16 F. (2d) 251, 252 (C. C. A. 8); *Coles* v. *Denslow,* 270 Fed. 22, 25 (C. C. A. 8).

The other appellees allege that they compete with Masonite in the sale of all building materials other than hardboard, and they assert that even as to hardboard they sell in the same markets and solicit the same customers. (See pp. 7–8, 61, *supra.*) These assertions of an adverse interest are hardly consistent with the existence of a fiduciary relationship.

3. *The "agents" have substantial control over the sale of hardboard and assume the burdens of ownership:* Masonite reserves no power under the agreements to control its so-called agents in the sale and distribution of hardboard with two significant exceptions: Masonite prescribes the prices and terms and conditions of sale at which the "agents" shall sell, and it refuses to permit them

to sell for industrial use. Otherwise, the contracts reserve to Masonite little power to control the sale and handling of hardboard by its "agents." Each "agent" hires its own salesmen and determines independently of Masonite how much time and money will be devoted to the sale and advertising of hardboard. Each "agent" determines how much hardboard it will order and is under no obligation to carry a full or rounded stock.[91] The "agent" bears the full expense and, with unimportant exceptions, has control over the handling of hardboard in its warehouse and its transportation to its customers.[92] The "agent" bears the entire cost of any damage resulting from defaults of its employees in handling hardboard. The "agent" has no right to return hardboard that it is unable to sell.

Throughout the life of the agreements the *del credere* aspect of the arrangement has required the "agents" to assume the entire burden of credit risk. Under the agreement in effect between 1933 and 1941 the "agent" bore certain other financial

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[91] Appellees argue that this is not true under the 1941 agreement because it requires Masonite to maintain in each "agent's" warehouse a two months' supply of hardboard (R. 1409). This provision, however, imposes an obligation upon Masonite and not upon the "agent." So far as the agreement shows the "agent" is free to keep this supply on hand or not as he chooses.

[92] The 1941 agreements, for the first time, imposed certain obligations upon the "agent" with respect to its handling of hardboard. (See p. 97, *infra*.)

burdens. For example, the "agent" made all reports required by governmental authorities and paid all taxes. The "agent" was responsible for insuring the hardboard. The "agent" paid the freight on hardboard to its own warehouse. By the 1941 agreements the burden of insurance was shifted to Masonite." The 1941 agreements also impose some limitations upon the "agents" with respect to the handling and advertising of hardboard. For the first time, the "agent" is obligated to post signs in his warehouse indicating that the hardboard is the property of Masonite and to label the hardboard so as to disclose the existence of the "agency."

Despite the changes made in 1941, the burdens still assumed by the "agents" and the power of control still remaining in their hands point to the conclusion that these agreements are not true agency contracts. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 354; *McMaster, Inc.* v. *Chevrolet Motor Co.*, 3 F. (2d) 469, 474 (E. D. S. C.); *Columbia University Club* v. *Higgins*, 23 F. Supp. 572, 574 (S. D. N. Y.); *D. M. Ferry & Co.* v. *Hall*, 188 Ala., 178, 184, 190–191 (1914). See also *Restatement of Agency*, Sec. 14.

[33] The provision with respect to taxes in the 1941 agreement is ambiguous. (See note 43, p. 97, *supra*.) Under the 1941 agreements Masonite pays the freight on hardboard to the "agent's" warehouse in the first instance, but the "agent" is required to repay the freight when it makes remittance to Masonite.

It may be that no one of the three considerations that we have discussed, standing alone, is decisive of the question as to whether these contracts establish a "genuine" agency. Taken together, however, and considered against the background of the appellees' announced intention to combine to fix prices and to suppress competition, they compel the conclusion that these separate contracts are "spurious" and not "genuine" agencies.[94]

III

IF THE COURT BELOW CORRECTLY UNDERSTOOD AND APPLIED *UNITED STATES* v. *GENERAL ELECTRIC CO.*, 272 U. S. 476, THEN THIS COURT SHOULD OVERRULE THAT DECISION

We have argued that this case is not controlled by *United States* v. *General Electric Co.* because

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[94] In the court below appellees argued that the agreements were similar in form and substance to the agreements in the *General Electric* case and that accordingly the decision there should be decisive on the question whether a "genuine" agency exists here. Before the agreements were modified in 1941 they differed from the agency agreements in the *General Electric* case in many important respects. It is apparent that appellees recognized the weakness of their position and that the purpose of making the new agreement in 1941 was to change the form of the contract so as to make it resemble more closely the form of the contract in the *General Electric* case. (See pp. 43–46, *supra*.) In the Appendix of this brief, pp. 109–117, *infra*, we compare the provisions of the agreements here with the provisions of the contracts in the *General Electric* case. The comparison shows that even the 1941 agreements differ from the General Electric contracts in a number of important respects. The differences all point to the conclusion that these are not "genuine" agencies.

even if it is assumed that the separate contracts are "agencies", the arrangement, viewed as a whole, is nonetheless an illegal combination in restraint of trade. (See pp. 78–88, *supra*.) The court below rejected this argument. In doing so it necessarily interpreted the *General Electric* case as creating a wide immunity within whose limits the agency relationship can be used with impunity to restrain trade. If that interpretation is correct, we submit that the *General Electric* decision should be overruled because it permits the purely formal aspects of a private legal relationship to obscure the economic facts and the considerations of public policy that should be decisive of questions arising under the Sherman Act.

In asking this Court to reconsider the doctrine, however, we are not suggesting that its reasoning is improper in all situations. It may well be that without violating the antitrust laws a trader can control the price at which his servants or paid employees shall sell his own property. But this is not the issue here. We are now assuming that the *General Electric* decision establishes a much wider immunity and that it permits agency to be used to impose restraints upon the market that would be illegal *per se* if accomplished by any other legal relationship.

The extraordinary immunity, assumed to have been granted by the *General Electric* decision, can only be justified as the logical result of the con-

cept of the identity of principal and agent.[95] It is said that when a principal fixes the price at which his agents shall sell, there is no restraint of trade because the property sold is the property of the principal; the act of the agent is the act of the principal, and the principal is merely exercising his right to fix the price at which he will dispose of his own property directly to the purchaser. By the same line of reasoning, it is possible to reach the conclusion that agency can never eliminate competition between principal and agent because in the eyes of the law there is one entity and not two. As applied in the instant case, the same reasoning demonstrates to the satisfaction of appellees that Celotex, Insulite, Johns-Manville and the other "agents", however they may appear to a layman, are not in fact powerful, independent, economic units but simply subordinate manifestations of Masonite's legal personality.

This concept of the identity of principal and agent is a fiction. To understand the origin and significance of the fiction it is necessary to refer to the history of the law of agency. The early common law permitted a person to act for another only in exceptional cases.[96] In the seven-

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[95] No defense of the decision based on the asserted economic merits of resale price maintenance is now possible. The decisions of the Court have foreclosed that argument. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

[96] Holdsworth, *History of English Law*, Vol. VIII, pp. 222–227.

teenth and eighteenth centuries the English Courts, prompted by the needs of an expanding industrial and commercial society, developed rules that permit a person to act through a representative and require him to accept responsibility for the representative's acts. The body of law thus developed was concerned primarily with the distribution of commercial risks and burdens arising from private transactions.[97] To explain the substance of the rules and to reconcile their application with the older common law doctrines, the courts resorted to the fiction that the agent was the mere instrument of the principal and that the acts of the agent were the acts of the principal.[98]

Although in time the fiction developed a certain vitality of its own, it cannot serve as an adequate explanation of either the origin or the substance of the rules of agency.[99] The utility of the fiction in any particular case must be demonstrated in terms of the substantive result achieved by its use and not

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[97] In developing the law of agency the courts drew largely upon the law merchant and to a lesser extent upon Roman law, civil law, canon law and admiralty. Holdsworth, *History of English Law*, Vol. VIII, pp. 227–229, 252, 253, 474, Radin, *Anglo American Legal History*, pp. 461, 470; Wigmore, *Tortious Responsibility*, 3 Select Essays in Anglo-American Legal History 474 at p. 536.

[98] Holdsworth, *History of English Law*, Vol. VIII, pp. 472–477; Holmes, *Agency*, 4 Harv. L. Rev. 345.

[99] See Holmes, *Agency*, 4 Harv. L. Rev. 345, 346; Seavey, *The Rationale of Agency*, 29 Yale L. J. 859; Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L. J. 584, 720.

in terms of some inherent logic the fiction is assumed to possess. In the field of commercial law it has been pointed out that undiscriminating use of the fiction sometimes produces results not consistent with good sense.[100] These limitations upon the utility of the fiction apply with particular force in the field of public law where the problem is not the adjustment of private rights and obligations but the reconciliation of private interests with the public policy embodied in statutes of general application.[101]

If we penetrate the fictional aspects of agency and consider the substance of its rules, it becomes apparent that they can be of little assistance in the solution of problems arising under the antitrust laws. The law of agency has been developed by an accretion of decisions dealing with situations and problems so numerous, varied, and complex as to have few common characteristics. It includes many special branches with rules of their own,[102] and its concepts cut across those of

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[100] Holmes, *Agency*, 4 Hary. L. Rev. 345, 346:

> Finally I shall give my reasons for thinking that the whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.

Cf. Seavey, *The Rationale of Agency*, 29 Yale L. J. 859.

[101] Cf. *Blackstone* v. *Miller*, 188 U. S. 189, 206. And see Jackson, *The Struggle for Judicial Supremacy*, pp. 292–294.

[102] For example, Master and Servant, Factors, Brokers, Auctioneers, etc.

other titles in the law."[103] For these reasons the rules of agency are not simple, clear, and unvarying in their application, and do not easily lend themselves to simple exposition or classification.

The varieties and incidents of agency agreements found in contemporary commercial society are as many and as varied as the situations for which those agreements were devised. The reasons that impel a decision in one case may not be persuasive in another. For example, it has been said that hardly any two contracts raising the question of "sale" or "agency" are sufficiently identical to make an opinion construing one an authority for another. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 164 Fed. 803, 805 (C. C. A. 6), affirmed, 220 U. S. 373. Moreover, a transaction or a course of action that may be described as agency for one purpose may for another purpose require a different label. See *Willcox & Gibbs Co.* v. *Ewing*, 141 U. S. 627; *Champion Spark Plug Co.* v. *Automobile Sundries Co.*, 273 Fed. 74, at p. 80 (C. C. A. 2); *Marrinan Medical Supply* v. *Ft. Dodge Serum Co.*, 47 F. (2d) 458, at pp. 460, 461, 462 (C. C. A. 8). Cf. *Commercial Investment Trust Co.* v. *Minon*, 104 F. (2d) 765 (C. C. A. 3).

The only common characteristic possessed by the cases that make up this amorphous body of law is that each case decides the ultimate question of who shall bear a loss or assume a liability. In making

[103] For example, Partnership, Domestic Relations, Corporations, Attorney and Client, Trusts, Bankruptcy.

this decision the courts examine the details of the arrangements and transactions between the parties, and give weight to facts and apply standards that have no necessary relevance to the question of whether competition has been suppressed in violation of the Sherman Act.

A reference to the part of this brief in which we argue that the agreements do not establish a "true" agency will illustrate the irrelevance of the purely private aspects of agency in an antitrust case. (See pp. 88–98, *supra*.) We point out that before 1941 the "agents" paid freight and taxes, bore the cost of insurance, and did not sell hardboard under Masonite's trade names. We also point out that no fiduciary relationship exists between the "agents" and Masonite and that the "agents" exercise a high degree of independence in marketing hardboard. These circumstances, we argue, show that the contracts are not "genuine" agencies. This is a sound argument only if we assume that this case can be treated as if the sole issue here were whether Masonite or the "agents", or perhaps some third person, should bear risks or losses arising out of the handling of hardboard. But the fact is that these circumstances are irrelevant to the real issues of the case.

The restrictive effect of the combination upon the market is the same regardless of whether Masonite or the "agent" pays the freight, taxes, and insurance and regardless of the trade name the hardboard bears. It is unreasonable to assume that al-

though the arrangement might be an illegal combination as long as the "agents" paid the taxes, freight, and insurance, its illegality vanishes as soon as those burdens are assumed by Masonite. It is equally unreasonable to assume that illegality can be cured by posting signs in a warehouse or by placing a label on hardboard reciting that it is being sold under an "agency" agreement. These changes do not affect in any way the purpose or the scope of the combination or its effect upon the market.[104] The reasoning of the *General Electric* opinion is objectionable because it attaches excessive importance to these private incidents of risk, burden, and loss.[105]

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[104] These observations are particularly pertinent in view of appellees' revision of the contract in 1941. It is apparent that the only purpose of this revision was to confer upon the agreements a few of the superficial indicia of agency without changing in any way the real substance of the arrangement or modifying its economic effect.

[105] See Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 993; Klaus, *Sale, Agency and Price Maintenance*, 28 Col. L. Rev. 312, 441, particularly at 315.

If it is to be decided that a system of resale price maintenance contracts does not violate the Sherman Act, it would be far more reasonable to put the decision on an economic ground rather than to justify it by reference to the formal aspect of the relationship between the distributors. It seems clear that this was the position of Mr. Justice Holmes in his dissenting opinion in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 410–411, and of Mr. Justice Brandeis in his concurring opinion in *Boston Stores* v. *American Graphophone Co.*, 246 U. S. 8, 27–28. The economic argument, however, has been rejected by the courts. (See note 95, p. 100, *supra*.)

The private aspects of agency may properly be adjusted by private contract but that adjustment should not control the operation of a public statute of general application. A statute of that kind draws the line between the legal and the illegal by its own terms and the line cannot be shifted or modified by private agreement. In recent decisions this Court has recognized this principle and has refused to permit the application of public statutes to turn on questions as to the nature of the private legal relationship existing between persons subject to the statute's terms. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 581; *United States* v. *San Francisco*, 310 U. S. 16; *Gray* v. *Powell*, No. 18 this Term, decided December 15, 1941. Cf. *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 220.

In *United States* v. *San Francisco, supra*, the Court construed the Raker Act (c. 4, 38 Stat. 242), which granted certain lands to the City of San Francisco. As one of the conditions of the grant Section 6 of the Act provided that "the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the grantee." The City of San Francisco delivered electric energy to a private utility company under a contract described as a "consignment." The private utility company, purporting to act as agent for the City,

then sold the power to consumers. Despite the form of the transaction, this Court held that the City had violated the condition of the statute, saying (p. 28):

> Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of § 6. * * * The City has in fact followed a course of conduct which Congress, by § 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. * * *

All of the considerations that induced this Court to apply this principle as to other statutes, apply with particular force in cases arising under the Sherman Act.[106] The statute is designed to deal

[106] At common law, the agency relationship was subject to the rules against restraint of trade. *Craft* v. *McConoughy*, 79 Ill. 346 (1875); *Leonard* v. *Poole*, 114 N. Y. 371 (1889); *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. 173 (1871); *Raymond* v. *Leavitt*, 46 Mich. 447 (1881); *Sampson* v. *Shaw*, 101 Mass. 145 (1869); *Samuels* v. *Oliver*, 130 Ill. 73 (1889); See also Mechem, *Agency*, Vol. I (2d ed., 1914), at page 76.

The lower federal courts have applied the Sherman Act to restraints of trade accomplished in part by the use of the agency relationship. See *Chesapeake and Ohio Fuel Co.* v. *United States*, 115 Fed. 610 (C. C. A. 6); *United States* v. *International Harvester Co.*, 214 Fed. 987 (D. Minn.) appeal dismissed, 248 U. S. 587.

with the substance of economic problems so as to protect the public interest in a competitive market and a free economy. Its words draw no distinction between agency and any other relationship. Facts, not fictions; substance, not form; the public interest, not private arrangements, are the proper guides for the application of the statute.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the court below should be reversed.

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APPENDIX

Comparison of the contracts in United States v. *General Electric Co., 272 U. S. 476, with the contracts between Masonite and the other appellees.*

GENERAL ELECTRIC [107]	MASONITE
1. General Electric Company did not agree to adhere to the same prices that it fixed for its agents.	1. Masonite agreed that it would adhere to the same prices that it fixed for its "agents".
2. General Electric made no attempt to escape liability for acts of its agents or to insulate itself against the other normal responsibilities of a principal by providing in the contracts that the employees of the agents were not its employees.	2. The 1941 agreement provides that the employees of the "agents" shall not be construed to be employees of Masonite "for any purpose whatsoever". Under the agreements that were effective throughout the period from 1936 to the present time, the "agent" agreed to indemnify Masonite against all damage resulting to persons or property arising out of handling or sale of hardboard by the "agent" or its employees.
3. The agents remitted to the General Electric Company a percentage of the	3. The "agents" of Masonite Corporation remit a fixed sum to Masonite without re-

[107] The provisions of both the "A" and "B" agency agreements have been used in this comparison. Where there was any doubt concerning the construction of the contracts, the interpretation of the Court was adopted.

GENERAL ELECTRIC

proceeds received from the sale of lamps.

4. The General Electric Company had the power to change the prices for lamps at any time by notice.

5. General Electric Company had the right to change the rate of commissions that the agents received. Its power to lower commissions was limited by the provision that commissions could not be decreased more than 15% without the consent of the agent.

6. General Electric agreed to maintain on the average a 60 to 90 day stock of lamps in the agent's warehouse. General Electric determined the size, type, class and quality of lamps that would be carried in the warehouse of the agents and determined the length of time that the

MASONITE

gard to the price at which the hardboard products are sold. Remittance is calculated on the basis of the carlot list price, less commissions, although the hardboard has been sold at the higher prices charged for less than carlot quantities.

4. Masonite could change its prices only after a fixed period of time had elapsed. The contract provided for a ten-day period in the event the prices were raised and a two-day period in the event that prices were lowered.

5. Masonite does not have the power to change the rate of commission without the "agents'" consent.

6. The "agents" are free to order hardboard products and are under no obligation to carry a full or rounded stock.

The 1941 agreements impose no obligation upon the "agent" to maintain a particular stock or a rounded stock; however, the contract

GENERAL ELECTRIC

lamps would remain in stock.

7. The contracts were entered into for a period of one year. The General Electric Company had the power to cancel the agreements by notice at any time for cause or if the agent did not conduct his business to the satisfaction of the General Electric Company.

8. General Electric Company made no attempt, by means of the contracts, to control the price of unpatented material sold in combination with the electric lamps.

MASONITE

provides that Masonite shall maintain an amount approximating a two months' supply at the "agents'" warehouses.

7. The agreements executed between 1933 and 1937 provided that they should continue until the expiration of the hardboard patent, having the longest unexpired term to run. Except for the two 1937 agreements with Dant & Russell and Flintkote Masonite had no right to cancel except for cause. The "agents" had the right to cancel upon six months' notice.

The 1941 contracts run until 1945 unless canceled earlier. The "agent" may cancel these contracts on six months' notice. Before 1945 Masonite may cancel the contracts only for cause; after 1945 Masonite may cancel the contracts on six months' notice.

8. The 1936 and 1937 "agency" agreements provided that in the sale of building materials sold in combination with hardboard, the "agent" shall not by discounts, rebates, quantity prices, or other concessions on the price of the unpat-

GENERAL ELECTRIC

9. General Electric reserved the right to recall all or any part of the stock in the warehouses of the agents during the life of the agency agreements.

10. General Electric bore the costs of transportation of lamps to the agents' place of business. The agents paid other expenses incident to transportation and storage of lamps and the delivery of lamps to customers.

MASONITE

ented material reduce the price for hardboard.

The 1941 contracts eliminate these provisions but provide that hardboard shall not be sold on combined bids or in any other manner that does not reveal to the purchaser the price which is being charged for the hardboard products.

9. Under the agreements in effect during the period October 10, 1933 to April 1, 1941 Masonite did not have the power to recall hardboard stocks in the warehouses of its "agents" during the life of the agreements.

Under the 1941 agreements Masonite has power to direct the "agents" to return unsold hardboard in their warehouses.

10. The "agents" assume all costs incident to the handling of hardboard in their own warehouses, to the advertising and sale of hardboard and to the distribution of hardboard from their own warehouses to their own customers.

Under the agreements in effect from October 10, 1933, to April 1, 1941, the "agents" paid the freight between Masonite's factory and their own

GENERAL ELECTRIC

11. General Electric Company assumed all risk of fire and flood and bore the expense of insurance carried on the stock in the warehouses of the agents.

The agent paid for lamps damaged while stored in his warehouse.

12. All lamps sold by the agents were advertised and sold under General Electric's trademarks and trade names. All packages of lamps contained a notice stating that the lamps were sold pursuant to an agency contract.

The agent was required to store the lamps in such a manner as to permit identification and inspection by General Electric. The agent was not required to post signs indicating that the lamps were the property of General Electric.

MASONITE

warehouses. Under the 1941 agreements Masonite pays the freight from its factory to the "agents'" warehouses, however the "agent" reimburses Masonite for this expense when it makes the remittance to Masonite in accordance with the contract.

11. Under the agreements in effect from October 10, 1933 to April 1, 1941 each "agent" agreed to procure at its own expense, insurance upon the hardboard stocks.

Under the 1941 agreements Masonite bears the expense of insurance.

The "agent" paid for hardboard that had been damaged while in his possession.

12. From October 10, 1933 to April 1, 1941 each "agent" sold hardboard under its own trade names and trademarks. The "agents" were expressly prohibited from selling hardboard under Masonite's trade names or trademarks. Each "agent" sold hardboard under its own trade names and trademarks. Prior to April 1, 1941 no signs were posted in the warehouses of the "agents" to indicate that the hardboard products were the property of the Masonite Corporation.

GENERAL ELECTRIC

13. General Electric paid whatever taxes were assessed on the lamps in the agents' possession.

14. The agents were not obligated to remit to General Electric under the contracts until the proceeds were col-

MASONITE

Under the 1941 agreements the "agents" are permitted to use Masonite's trade names and trademarks. If the "agent" uses its own trade names and trademarks the label must show that the hardboard is being sold pursuant to an agency agreement with Masonite. The 1941 contracts require the "agent" to store hardboard in such a manner as to afford ready identification and inspection by Masonite and to post signs in its warehouse indicating Masonite's property interest in the hardboard.

13. Under the agreements in effect from October 10, 1933 to April 1, 1941 the "agent" paid all taxes and excises and made all reports required by Governmental authorities.

The 1941 contract provides that Masonite shall pay taxes on the consigned stocks and that the "agent" is not liable for taxes "which manufacturer is required to absorb pursuant to any provision of law, applicable to sales made hereunder."

14. Under the agreements executed between 1933 and 1935 the "agents" paid half of the amount due to Ma-

GENERAL ELECTRIC

lected from the customers to whom the agents sold lamps except in those cases in which the payment from the customers was overdue. In the latter case the agent was obligated to remit to General Electric under the agreement whether or not the agent collected the proceeds from its customers.

The agent also received a "special commission" of five percent if remittance was made to General Electric, whether or not the accounts were collected, on the seventh ("A" agents) or fifteenth ("B" agents) day of the month for sales made in the preceding month.

15. No warranty of quality was extended by the General Electric Company to its agents.

The instructions to the agents stated that no guarantee shall be made on lamps by the agents except in accordance with General Electric's specifications.

MASONITE

sonite within 20 days after the close of the month in which shipment was made even though the "agent" had not sold the hardboard. The remaining one-half was remitted to Masonite 20 days after the end of the month in which the hardboard was sold whether or not the proceeds were collected from the purchaser. Remittance was made under the 1936 and 1937 contracts 20 days after the end of the month in which the hardboard was sold. The "agent" was obligated to remit to Masonite even though it had not collected the proceeds from its customers.

Under the 1941 contract the "agent" is not obligated to remit to Masonite until after it has received payment from its customers except in those cases in which payment is 60 days overdue.

15. Masonite extends a warranty of quality to its "agents". Under the agreements in effect from October 10, 1933 to April 1, 1941 Masonite warranted to its "agents" that all hardboard products should be of "good workmanlike" c h a r a c t e r. Under the 1941 contracts

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16. The agents' account books and records contain information relating to transactions in connection with sale and distribution of lamps were open to inspection by General Electric Company at all times during business hours.

17. There was no obligation on the part of the agent to acquire for its own use and pay for any of General Electric's products.

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Masonite warrants that the hardboard shall be of the grade and quality currently offered for sale by Masonite through its own employees.

The contracts did not confer upon the "agent" the authority to extend a warranty of quality to purchasers.

16. Under the agreements in effect from October 10, 1933 to April 1, 1941 Masonite was given the power to examine the books and records of its "agents" by independent accountants or auditors. The contract provided that no confidential or commercial information should be divulged to Masonite except information relating to a violation of the contracts.

Under the 1941 agreements Masonite may examine the books and records of the "agents" pertaining to hardboard at any time during business hours without regard to the character of the information contained in those books.

17. The provisions in the agreements relating to "longs" and "shorts" bound the agent to acquire and pay for "longs" and "shorts" resulting from the cutting of standard size

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18. The agreements provide that the proceeds from the sale of lamps shall be held in trust for the manufacturer. No provision was made for segregation of proceeds.

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boards. The provisions of the contracts relating to "longs" and "shorts" were eliminated by letter agreements dated September 1, 1940.

18. The contracts contain no provision requiring the "agents" to segregate the proceeds from the sales of hardboard from its own general funds.

The 1941 contracts for the first time provide that the proceeds from the sale of hardboard shall be held "in trust" by the "agent" for Masonite. The contract does not obligate the "agent" to segregate the proceeds.

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